Supreme Court of the United States

OCTOBER TERM, 1962

No. 631

ALVIN R. CAMPBELL, ET AL., PETITIONERS

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

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[fol. 4]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL and DONALD LESTER

vs.

UNITED STATES OF AMERICA

TRANSCRIPT OF PROCEEDINGS

JOHN F. TOOMEY, SWORN

DIRECT EXAMINATION

THE COURT: Where do you live, Mr. Toomey?
THE WITNESS: 60 Fowler Street, Randolph.
THE COURT: By whom are you employed?
THE WITNESS: By the Federal Bureau of Investigation.
THE COURT: In what capacity?
THE WITNESS: Special Agent.
THE COURT: How long have you been a Special [fol. 5] Agent?
THE WITNESS: Eighteen years.
THE COURT: Where are you located now?
THE WITNESS: I am presently located in the Brockton, Mass. resident agency.
THE COURT: How long?
THE WITNESS: Since 1956.
THE COURT: Were you located there and present at the time of the so-called bank holdup in Canton?
THE WITNESS: I was, your Honor.
THE COURT: Now, in the course of your duties did you talk to a man by the name of Staula in regard to a bank robbery in Canton?
THE WITNESS: I did, your Honor.
THE COURT: Counsel may inquire. That is as far as I am going and as far as the Court will go. I will be glad to ask any other questions which counsel for these defendants feel I should ask.

I am going to have one counsel cross-examine, by the way. That applies also to the Government.

* * * *

[fol. 7]

CROSS-EXAMINATION

Q. (By Mr. O'Donnell) Now, Mr. Toomey, do you recall approximately the time of the interview with Dominic Staula?

A. To the best of my recollection it was in the morning. I do not recall the exact hour.

Q. Further, Mr. Toomey, may I have the approximate date of the day?

A. It was the day following the robbery, about on [fol. 8] July 18, 1957—I interviewed him on July 19, 1957.

Q. Mr. Toomey, where did the interview on July 19, 1957 take place?

A. To the best of my recollection it was at the Canton Police Station.

Q. And who else was present during that interview?

A. Do you mean immediately in the presence while the interview was taking place?

Q. Yes.

A. I was alone talking to Mr. Staula there.

Q. Was Mr. Staula known to you to have been in the bank on the previous day during the robbery?

A. His name was furnished to me as a person to be interviewed, as one of the witnesses.

Q. That was in the bank?

A. Yes.

Q. So that at this time you were interviewing Mr. Staula, you knew that he was on the premises of the bank during the robbery?

MR. KOEN: I pray your Honor's judgment, conver- [fol. 9] sation with Mr. Staula?

A. I did.

Q. And did you ask him questions?

A. I did.

Q. And did he provide you with answers?

A. He did.

Q. Did you make notes of what Dominic Staula told you July 19, 1957 in the Canton police station?

A. I did, sir.

Q. After Mr. Staula talked to you as a result of what he said to you, it is so, Mr. Toomey, that you knew he was in the bank on the previous day and observed certain things?

A. Based on the information he had given me I had reason to believe that he had been there.

Q. With your experience you took down the statements of Mr. Staula—what he said—

MR. KOEN: I pray your Honor's judgment.

THE COURT: Let me have that question.

(The question was read.)

THE COURT: I'll exclude it. You can put it in another form.

Q. As to whether or not you wrote down what Mr. Staula told you?

[fol. 10] A. Do you mean, sir, verbatim?

Q. Sir, the question is whether or not you wrote down—what Mr. Staula told you—

MR. KOEN: Wait a minute, please. May I have the question read back, sir?

(The question was read.)

THE COURT: I excluded that question and asked that it be rephrased. Put the question again. I excluded that question in that form.

Put it in another form. That is what Mr. Koen wanted.

MR. KOEN: I object to the conclusion and ask your Honor.

THE COURT: I have excluded it.

MR. O'DONNELL: Insofar as the question is concerned, the majority opinion, would you ask the question of Mr. Toomey if he wrote down what Mr. Staula told him in the interview?

THE COURT: No, that—

MR. KOEN: Now that I have no objection to, but I object to a question which includes in it a conclusion and that was my primary objection.

THE COURT: Apparently Mr. Koen does not object to the question you have just asked now. Of course, the [fol. 11] responsibility for this inquiry is mine.

The Supreme Court has delegated to me to carry it on, but I don't want to tie myself down. What was the question?

(The question was read.)

THE COURT: I am going to refrain from asking inquiries, for I brought these defendants over here pursuant to the mandate of the Court and to permit you to make inquiries within or in conformity with the mandate that came down and the issue that is before the Court now.

Q. Did you, Mr. Toomey, write down what Mr. Staula told you at the interview?

A. I took notes concerning the information that he furnished to me.

Q. So your answer is that you wrote down what he told you to at the interview?

MR. KOEN: I pray your Honor's judgment. That is not what the witness said.

THE COURT: I'll exclude it for he didn't say that. I'll let you cross-examine him.

Q. Mr. Toomey, did you give Mr. Staula the paper that you made your notes on to read over?

[fol. 12] A. I did not, sir.

Q. Did you read it back to Mr. Staula?

A. As I previously stated, I took notes and I did not read the notes back to him verbatim.

Q. Well, with your experience—you did not read the notes back that you made, is that your testimony?

MR. KOEN: No, it isn't—I pray your Honor's judgment.

Q. Now, Mr. Toomey, you read something back to Mr. Staula, did you?

THE COURT: No, he hasn't said that he read anything back.

Q. Did you read something back to Mr. Staula?

A. No, sir, I wouldn't say that I read it back to him. What I had written—

MR. KOEN: Wait a minute. You have answered the question.

* * * *

[fol. 15] Q. Now, Mr. Toomey, where in the Canton police station were you during the course of your interview?

A. To the best of my recollection, sir, it was in a room that is immediately off the lobby on the right-hand side of the building as you face it.

Q. And you were sitting at some table, were you?

A. If I remember correctly, we were.

Q. And Mr. Staula was sitting next to you?

A. Yes, close to me—I don't recall whether he was opposite me or not.

Q. So that you were able to hear everything that he said?

A. Yes.

Q. And as you previously told us, you wrote down what he said?

MR. KOEN: Objection.

THE COURT: That is a matter I have to weigh, decide.

MR. KOEN: In addition, the witness has previously [fol. 16] answered the self same question, not as recited by counsel for the defendant.

THE COURT: That is right.

Q. Did you write down what Mr. Staula told you?

A. I took notes—

Q. Yes or no, did you write it down?

A. Do you mean verbatim?

Q. Did you write down what he told you?

THE COURT: Did you or did you not?

THE WITNESS: I did not write down everything that he told me.

Q. No, did you write down what Mr. Staula told you, yes or no?

A. Yes.

Q. And isn't it so that you wrote—and at that time your purpose as an agent with 15 years' experience was investigating a crime known as a bank robbery?

MR. KOEN: Wait a minute, please. May I have the question read back?

(Question read.)

MR. KOEN: I don't believe—

MR. O'DONNELL: You knew you were investigating—

MR. KOEN: Wait a minute. I have objected to the [fol. 17] question.

Q. Did you hear my question?

MR. KOEN: I have objected to the question and I say to you, sir, that it is not a proper question, because it is not complete, or a question that makes sense. I do not understand it.

THE COURT: Rephrase it, if you will.

Q. You knew, Mr. Toomey, that you were investigating a bank robbery?

A. I did, sir.

Q. You have certain established procedures in the Federal Bureau when investigating matters of that nature?

A. That is correct.

Q. And you deemed that a matter of serious consequence?

MR. KOEN: Wait a minute, please.

Q. In investigating—don't answer the question until I finish. You deem that, sir, as a matter of serious consequences when you are investigating a bank robbery?

MR. KOEN: I don't understand the question, if it please the Court.

THE COURT: I haven't those before me. Were you the only one investigating this?

[fol. 18] THE WITNESS: No, your Honor.

THE COURT: A number of others?

THE WITNESS: There were.

THE COURT: Any others beside Mr. Staula at the bank that day?

THE WITNESS: Yes, your Honor.

THE COURT: Another agent?

THE WITNESS: Yes, your Honor.

THE COURT: Obviously an investigation you make is important, so it carries with it consequences.

THE WITNESS: Yes, it does, your Honor.

Q. Now, Mr. Toomey, what, if anything, did you do regarding the interview with Dominic Staula when it was—when he finished orally telling you about his experi-

ence of the day before—what did you do when he finished orally telling you of his experience the day before at the bank?

A. I dictated it.

Q. Did you dictate it in the presence of Dominic Staula?

A. I did not.

Q. Now, as a matter of your method on that date, when you received this information from Dominic Staula, did you make hand notes—did you write them down?

[fol. 19] A. I did.

Q. What method did you employ at that time in the police station insofar as double checking your notes with Mr. Staula?

A. After Mr. Staula told me of what he had seen in the bank, and I took notes during the period of time that he was reciting his experiences, I then asked him several questions.

He answered these questions and I took notes concerning his replies to my inquiries. After that it was complete and I then went over the entire story again with Mr. Staula, refreshing my memory with the notes I had taken to be certain that the story was accurate.

Q. And to be certain that the story was accurate, and you were looking at your notes when you did this?

A. I was.

Q. And it was your purpose, sir, to be certain also that your notes were accurate?

A. That is correct.

Q. And as a result of your interview with Dominic Staula and going over it again, you were satisfied as an investigator that your notes were accurate?

A. That is correct.

[fol. 20] Q. Now, it is so, isn't it, Mr. Toomey, that in employing that method of reviewing what Mr. Staula had told you, that you wanted to be certain as you have told us, that your notes were accurate,—right?

A. Right.

Q. And you also wanted to be certain that Mr. Staula felt that they were right?

MR. KOEN: I pray your Honor's judgment.

THE COURT: Exclude that.

MR. O'DONNELL: I object.

Q. Now, during that double check, when you read it back to be certain, it is so, isn't it, Mr. Toomey—

THE COURT: I think that question could be framed in another way—it is only cluttering this record now. He said that he read it back. Whatever his purpose was he stated a conclusion. I exclude that question.

Q. Mr. Toomey, when you reviewed your notes and went over what Mr. Staula told you, it is so that there was nothing Mr. Staula didn't say that your notes were inaccurate, did he?

A. I have no recollection of him saying that.

Q. If he did say that, with your experience, that would [fol. 21] be something that would be significant—you would make a note of that if a witness under these circumstances disagreed with your notes, wouldn't you?

A. I would have—

MR. KOEN: Wait a minute, please. May I have that question read back, please?

(Question read.)

MR. KOEN: I object to that.

THE COURT: Excluded.

Q. Mr. Toomey, as a result of that interview with Mr. Staula, what if anything did he say when you completed your check of your notes and going over your story again?

A. I can't recall that he said anything.

THE COURT: When you completed your rechecking, you mean that you read back the notes to Mr. Staula, isn't that right?

THE WITNESS: No, I did not mean to imply that I read the notes back to him. What I meant to imply was that I went over it, the information as he had furnished it, refreshing my memory from the notes I had previously taken.

THE COURT: Did you copy that the same day?

[fol. 22] THE WITNESS: I did, your Honor.

THE COURT: Where?

THE WITNESS: At my office in Brockton.

THE COURT: Not at the bank?

THE WITNESS: No, your Honor.

THE COURT: But you talked to other witnesses beside Staula that day?

THE WITNESS: I did, your Honor.

Q. Now, Mr. Toomey, you stated previously that you had been looking at your notes when he or you reviewed it in Staula's presence on that July 19th, that is so, isn't it?

THE COURT: Haven't you covered that pretty well?

MR. O'DONNELL: Yes, your Honor.

Q. Now, Mr. Toomey, it is so, isn't it, that—of course, not to be facetious, you weren't in the bank the day before, were you—right—during the robbery?

A. No, sir.

THE COURT: Exclude that.

Q. So that whatever information you received the next day insofar as Staula is concerned came from Mr. Staula?

[fol. 23] A. That is correct.

Q. You made notes about what he told you?

A. Yes.

Q. And on what kind of paper did you make the notes?

A. I made the notes on a large white-lined pad.

Q. Did it have a carbon in it?

A. No, sir.

Q. As a result of making the notes on pads, was it your method that day—did you employ a technique of having Mr. Staula initial or sign these notes that you made on the white pad?

MR. KOEN: May we have that broken down—it is two questions, sir.

Q. Did Mr. Staula sign what you wrote on the large lined pad?

A. He did not, sir.

Q. Did he have occasion to initial it by your request?

A. He did not, sir.

Q. When you have a report, as you described, that you made out on that day, you have a method for preserving the information—did you use any method of preserving information that you acquired from Dominic Staula?

MR. KOEN: I pray your Honor's judgment; at this point there has been nothing said about a report and the [fol. 24] document described is not a report and I object to it on that basis.

THE COURT: I exclude it. There is no statement that you signed?

THE WITNESS: That is correct, your Honor.

THE COURT: How many other witnesses did you see that day?

THE WITNESS: One other to the best of my recollection, your Honor.

THE COURT: The other agent—was that discussed with him?

THE WITNESS: Yes, your Honor.

MR. KOEN: The point that I make is that at this juncture in the witness' testimony, counsel has referred to notes which he had prepared in Canton as a report.

My position is that at that juncture it was not a report and that is a misnomer.

THE COURT: Rephrase it, Mr. O'Donnell.

Q. The memorandum that you made was on a pad?

MR. KOEN: I object--I pray your Honor's judgment as to the word Memorandum. It was not what he said.

THE COURT: Whatever writing it was that he made.

[fol. 25] MR. LEWISON: He wants to testify.

THE COURT: Whatever the writing was that he made, what was it?

Q. Mr. Toomey, what do you call the writing that you made as the result of the interview with Dominic Staula in the police station on July 19th?

A. My investigative notes.

Q. Now, Mr. Toomey, when you went back over this story with Mr. Staula to check the accuracy of the using of your notes, was the story the same as told by Mr. Staula, the same as your notes?

MR. KOEN: I pray your H[illegible]or's judgment.

THE COURT: I excluded tha[illegible]estion.

MR. O'DONNELL: Objection.

MR. KOEN: That is one of the basic questions for the Court to determine.

THE COURT: That is right. It really is.

Q. When you went over your notes, Mr. Toomey, when you went over them with Mr. Staula, was it to check the accuracy—was it the same story contained in your notes?

A. What? I don't follow you.

Q. Your method was to check your notes?

[fol. 26] A. Yes.

Q. You employed a device of checking your notes?

MR. KOEN: Object.

THE COURT: Was it custom and practice to take notes and take statements?

THE WITNESS: It is, your Honor.

THE COURT: That is what you were doing—you took notes?

THE WITNESS: Yes.

* * * *

[fol. 27] Q. Now, Mr. Toomey, the story you were checking was the same story as was in your notes?

A. As well as I can recall, sir.

* * * *

[fol. 30] Now, Mr. Toomey, how much time did you spend on the interview with Dominic Staula on the 19th?

A. To the best of my recollection a half hour.

Q. When you left the Canton police station did you take the writings that you had made of the interview with Dominic Staula?

A. You mean my notes, sir?

Q. Well, you wrote them—describe the length and the width of that pad that you wrote on?

A. It was a standard sized pad, 8½ × 11.

Q. 8½ × 11—and was it your purpose to write down what this witness told you?

MR. KOEN: May it please the Court, we have already been over that. I object on the basis that it has been previously answered.

THE COURT: He said he took them down and it is all a part of the record. You have gone over them twice already.

Q. You have also testified that you were satisfied that what you wrote down was accurate?

MR. KOEN: Objection.

THE COURT: It has been answered. It is already in the transcript.

Q. When you left Mr. Staula, you had papers that you [fol. 31] had written on that you made a memorandum on constituting the interview that you had with Mr. Staula?

MR. KOEN: Objection to the word memoranda sir, the last statement. That is not consistent with the witness' testimony.

THE COURT: He said that he made notes.

MR. KOEN: "Investigative notes" was the phrase he used.

THE COURT: This was the custom in conformity with the practice of the Agents, Federal Agents, is it?

THE WITNESS: It is, your Honor.

THE COURT: And sometimes when a statement is taken—was it done here?

THE WITNESS: Yes.

THE COURT: He didn't sign it?

THE WITNESS: The notes that were taken here were not signed by Mr. Staula.

Q. Now, on this date as far as your interview with Mr. Staula was concerned, what rules and regulations, if any, were you functioning under regarding that interview?

MR. KOEN: I pray your Honor's judgment on that. That is a broad question. If the hearing is limited to the [fol. 32] matter of taking these notes, I would have no objection, but if it is a general broad question as to the rules and regulations that he was acting under, in his capacity of an Agent, I am going to object.

THE COURT: I will tell you what I am going to do. I will permit you to interrogate the witness regarding procedures provided it is done in conformity—if there is a regulation or not—with reference to it—no further than that—with reference to the taking of the statement.

MR. KOEN: And on July 19th.

THE WITNESS: Yes.

Q. Were you following instructions on July 19th?

MR. KOEN: I pray your Honor's judgment.

THE COURT: I exclude that.

Q. Were you under instructions on July 19th as to the interviewing of these witnesses?

A. I was.

Q. And as a result of your instructions—

THE COURT: Were the instructions any different than you follow in every investigation?

THE WITNESS: No, your Honor, I thought he had reference to specific instructions to interview this par-

[fol. 33] ticular person, Staula.

THE COURT: Did you get instructions to interview him?

THE WITNESS: Not in the manner in which he should be interviewed—my instructions were to interview him.

THE COURT: And you did?

THE WITNESS: Yes.

THE COURT: He interviewed them—the witness—I meant him, Staula. And you had another as well?

THE WITNESS: Yes, your Honor.

Q. And it was a part of your instructions, is it not so, that you were to write down what this witness told you?

A. There again, sir, I took notes of what he told me.

Q. I talk of your instructions—isn't it the policy—isn't it so?

THE COURT: Didn't he say that he was told to take a statement—didn't he say that—if it became necessary.

MR. KOEN: No, no.

THE WITNESS: No—to take notes concerning what the witness had to say.

Q. And that was part of your instructions when you

[fol. 34] went to interview him?

A. They were not given specifically. It was understood.

Q. You would not go back to your supervisor after interviewing a witness to a bank robbery without notes, would you, Mr. Toomey?

A. I would not.

Q. So that was part of your—a necessary part of your instructions to take notes?

A. Here again, sir—

Q. Now, Mr.—

THE COURT: Let him answer.

A. They are implied instructions when we interview a witness. I was not specifically told to take notes from Staula.

Q. Just a moment—insofar as your performance as an F.B.I. Agent, you know that it is a matter of well-defined instructions that you do write down what a witness like Mr. Staula tells you, that is so, isn't it?

A. I took notes concerning what he said.

Q. And you are told to do this—that is part of your training and functiong, if you are an agent, isn't that so?

A. Going back to your original—

[fol. 35] Q. Isn't that so?

A. Yes, it is.

Q. You function under a regulation like that—

THE COURT: So does every police officer and every investigative agent of the Federal Government.

Q. And in taking these notes, your one objective is to get the whole story, that is so, isn't it?

A. That is correct.

Q. And you got the whole story in this case, didn't you?

MR. KOEN: I pray your Honor's judgment.

THE COURT: I exclude that.

Did you say that he got the whole story, your question as to what took place in Canton—do you mean to tell me that is the whole story?

Q. From Dominic Staula—

MR. KOEN: That was not the question. Now, I object to this also.

THE COURT: I exclude that question.

MR. KOEN: How could he answer that?

Q. As a matter of fact, you are also trained in the techniques of interviewing witnesses so that you can draw out from them information—that is so, isn't it?

[fol. 36] THE COURT: I exclude that.

MR. O'DONNELL: Objection.

THE COURT: I will let him answer your question.

MR. KOEN: I have no objection.

A. Yes.

Q. And you employed these techniques when you interviewed Staula, isn't that so?

A. I did.

Q. So that when you finished with Staula, it is so, isn't it, that you were able to take the whole story—that is so, isn't it?

MR. KOEN: We have gone into that. He described the manner which he followed.

THE COURT: When you become an F.B.I. agent from time to time you were given instructions—you went to school, didn't you?

THE WITNESS: Yes, your Honor.

THE COURT: And they told you how to prepare statements, and how to conduct an interview?

THE WITNESS: That is correct, your Honor.

THE COURT: And that is what you followed?

THE WITNESS: Yes.

THE COURT: One of the difficulties with the ques-

[fol. 37] tion is that you requested him, if he got the whole story from Mr. Staula—how in the name of the Lord could this man tell what was in Mr. Staula's mind. He can't tell whether he got the whole story any more than you can, except what Mr. Staula told him.

Q. What I say—to clear it up, what Mr. Staula told you, you wrote down, that is so, isn't it?

A. I made notes concerning what he told me.

Q. You made notes concerning everything he told you, Mr. Toomey, that is so, isn't it?

THE COURT: No—

MR. KOEN: Let him answer.

A. No, I did not.

Q. Is it fair to say, Mr. Toomey,—for me to say that when you interviewed Mr. Staula, you made notes of substantially everything he told you, according to your instructions, that is so, isn't it?

MR. KOEN: I object.

THE COURT: I exclude that.

MR. O'DONNELL: Objection.

THE COURT: As a matter of fact, one question or two before that, he answered that he said, "No".

[fol. 38] Q. You earlier used in your testimony here today—you used an expression verbatim, didn't you?

A. I did.

Q. Who suggested that word to you—how did you happen to use the word "verbatim"?

A. Nobody did.

Q. So when you were taking notes from Mr. Staula you were taking them down in long hand writing?

A. I was.

* * * *

[fol. 39] Q. Mr. Toomey, insofar as this interview with Dominic Staula was concerned, on your instructions regarding that, would you please tell this Court what the regulations and your instructions demanded of you on this occasion to include this in your written notes?

MR. KOEN: Objection to this. What is the purpose? I cannot see the materiality of that.

THE COURT: Did you get any specific instructions—

THE WITNESS: Do you mean if I asked that—

MR. O'DONNELL: Not at all—

THE COURT: Did you get any instructions?

THE WITNESS: My instructions were to interview Dominic Staula, who was a witness to the robbery. Those are all the instructions I got.

* * * *

[fol. 40] Q. What is your training and instructions regarding the taking of interviews like the one that you had with Dominic Staula?

A. To determine what the individual saw with respect to the matter under investigation.

* * * *

[fol. 43] Q. Mr. Toomey, where are the papers on which you made your notes during the interview with Dominic Staula?

A. That was destroyed.

Q. When were they destroyed?

A. After I had received from the Boston office the typewritten transcript of the interview for approval.

THE COURT: You were down at the Brockton office?

[fol. 44] THE WITNESS: Yes, your Honor.

THE COURT: I did not realize you were not at the Boston office. That was the Brockton office?

THE WITNESS: Yes, your Honor.

Q. How long was that after July 19, 1957?

A. That the notes were destroyed? Five or six days.

Q. Days?

THE COURT: Mr. O'Donnell—he said five or six days.

Q. What year?

A. 1957.

THE COURT: Five or six days, within that time you took it?

THE WITNESS: From the time I dictated it until the report came back typed.

THE COURT: Is it the custom and practice to tear up those reports.

THE WITNESS: It is after comparing them with the report to see that the report is accurate.

* * * *

[fol. 46] Q. Will you answer that, Mr. Koen—I mean, Mr. Toomey?

A. No, I wouldn't say it was an accurate transcription of the notes, as such.

Q. All right, now, is your testimony then before this Court that your Bureau would in this instance make an inaccurate transcript, is that what you are telling us?

[fol. 47] A. No—in answering that question—

* * * *

Q. Is it your testimony that the transcript of your notes [fol. 48] of the interview with Dominic Staula—was it inaccurate?

A. No.

Q. Therefore, is it your testimony that the transcript of the notes you took from Dominic Staula was an accurate one?

A. Explain what you mean by "transcript".

Q. You used the word.

THE COURT: He said "notes".

Q. You introduced the word transcript. What do you call the reproduction of your notes from Dominic Staula —what did you call it?

A. I had reference to—

Q. What do you call the reduction of your notes from Dominic Staula, Mr. Toomey, answer that question—what do you call it?

THE COURT: He has called it—he said he took notes of what was said, and he went to the station and went to the office, rather, and dictated them.

THE WITNESS: I dictated them.

THE COURT: To some girl there?

THE WITNESS: No, sir, to a Dictaphone machine.

[fol. 49] Q. You previously testified when I asked you, when those notes were destroyed, and you said "After I received from Boston the typewritten transcript of the interview for approval." You used the word transcript.

A. Yes, and I had reference to the typed interview form that was returned to me.

Q. Was there anything in your notes that you left out of the typewritten form?

A. There was not, sir.

Q. And therefore it is so that you found the typewritten form accurate insofar as your notes were concerned?

A. I did.

Q. Your procedure was to sit down and look at both of them and after you were satisfied they were accurate, you destroyed the notes, that is so, isn't it?

A. That is correct.

Q. Now, Mr. Toomey, on how many occasions did you see Mr. Staula?

A. To the best of my knowledge on one occasion.

Q. And your transcript that you told us about, did you call that an interview report?

A. Repeat that, please.

Q. Did you caption that one described as an interview report?

[fol. 50] A. Yes.

* * * *

[fol. 51] Q. Essentially, substantially, you did address Mr. Staula to this effect, that he use his best memory and to think it over carefully, and tell you what he remembered, isn't that so?

A. As accurately as he could.

Q. Yes. That was, as you say, your objective, during the interview, was to get accurate information, that is so, isn't it?

A. Correct.

* * * *

[fol. 52] Q. You were vitally concerned with the accuracy of what Mr. Staula was telling you, is that so?

A. Yes.

Q. And during the interview, right?

A. Yes.

Q. And you did go over it with Mr. Staula to make sure that what he was telling you was correct?

A. I did go over it with Mr. Staula.

[fol. 53] Q. He told you it was correct?

A. He did.

THE COURT: He said he went over it the second time and said it was correct.

Q. In pursuing this matter—during the interview, and with Mr. Staula, when it finally came to a conclusion it is so, that on checking with Mr. Staula, he told you that what he had given you was correct as contained in your notes—that is so, isn't it, Mr. Toomey?

A. Mr. Staula did not look at my notes, if you have reference to that.

Q. You read your notes—it helped to double check them after you had taken them?

A. Sir, I went over the story again, referring to my notes to refresh my memory.

Q. And doing it aloud in his presence, Mr. Staula's?

A. Yes.

Q. And he approved them and you indicated what you were checking from your notes?

MR. KOEN: Objection.

THE COURT: The witness said he went over his notes.

Did you mean to infer that you read your notes over [fol. 54] to Mr. Staula?

THE WITNESS: No, sir, I did not.

THE COURT: You looked at them and then you repeated what he said—you didn't read them over to him?

THE WITNESS: No.

THE COURT: He didn't see them?

THE WITNESS: No, your Honor.

THE COURT: They were in your possession so he could not have done that.

Q. There was the desk in the front of where both of you people were sitting?

A. Yes.

Q. Your notes contained the whole story supplied to you by Mr. Staula?

A. That is correct.

Q. And it was vital, wasn't it, Mr. Toomey, that what was contained in your notes be Mr. Staula's story?

A. That is correct.

Q. The method you employed to double check was to read your notes, of what Mr. Staula had told you aloud and get Mr. Staula to agree with you that that was accurate—the information that you had for future use, that is so isn't it, Mr. Toomey?

[fol. 55] A. Not exactly. I did not read them back to the witness. I went over the story again, refreshing my memory by referring to my notes.

Q. That is right—that is what your memory was, which was on the papers that you had recorded—and whatever you said came from those papers, that is so, isn't it?

A. No, sir, not everything.

Q. And came from what Mr. Staula told you, right?

A. I don't follow you.

THE COURT: Did it come from the notes you made with reference to what he said to you?

THE WITNESS: A portion of it.

THE COURT: Now was he seated right aside of you so that he could read your statement?

THE WITNESS: He was in close proximity. He could have.

THE COURT: Did he?

THE WITNESS: Not to my knowledge.

Q. It is so, at least—

MR. KOEN: I am going to object to a word used by the Court. The Court used the word "statement".

THE COURT: I did not mean statement. I meant a report.

[fol. 56] MR. KOEN: No, sir.

THE COURT: I mean notes. Was it notes that you had?

THE WITNESS: Yes, your Honor.

THE COURT: You read the notes before he said, "So long" and bid him goodbye?

THE WITNESS: Yes.

Q. Was there anything, Mr. Toomey, that you went over with Mr. Staula that was not included in your notes?

A. I do not recall anything, sir.

Q. And isn't it so, that when you went over this story to double check its accuracy, that there was nothing Mr. Staula disagreed with as to your version of the story as told you by Mr. Staula?

MR. KOEN: I think the word "double check" is not a proper description.

THE COURT: That is so, and I don't see how he can tell what Mr. Staula's state of mind was.

Q. He voiced no disagreement with you, Mr. Toomey, did he?

A. No, sir.

• • • •

[fol. 59] Q. Mr. Toomey, what particular technique did you use in writing down the interview with Dominic Staula?

MR. KOEN: Haven't we covered that, sir?

MR. O'DONNELL: No.

THE COURT: He described how he did. He said he read it in the Dictaphone—took notes and dictated something into a Dictaphone.

Then later it was sent back from the main office, I suppose, in Boston.

THE WITNESS: Yes, sir, that is right, sir.

THE COURT: And then destroyed the other report. So that is the technique.

* * * *

[fol. 60] Q. You wrote this report—you put certain statements of the witness in quotes?

A. My recollection is that there was one in quotes.

* * * *

[fol. 61] Q. Now, Mr. Toomey, when you put in a description into this report, setting out sex, race, age, height, weight, complexion, build, and in answer to those designations, you would call that verbatim?

* * * *

[fol. 62] THE COURT: In other words, were those, your words, predicated on the notes that you took rather than what he said to you?

THE WITNESS: The description, your Honor, namely, the word "Male, height 5 feet 10", whenever those occur, they would be the words of the witness Staula.

* * * *

[fol. 64] Q. Mr. Toomey, the entire description contained in this report are words of the witness?

Q. Mr. Toomey, in this report, on five or six occasions it reads "It was stated by Mr. Staula"—"Mr. Staula went on to state that he did not observe three men in the bank."

Your technique in so reporting it was to reflect statements made by the witness, Staula, in this report, that is so, in this report, right?

A. That is correct.

THE COURT: On the question before, when you gave me that answer, you said it was accurate—did you mean [fol. 65] the description given of the men?

THE WITNESS: Your Honor, with respect to this description, I would have asked the witness the height.

THE COURT: The question that you were asked before, do you mean to confine that to the description, rather than the whole statement?

MR. KOEN: That was the question, sir, as to the description, sir.

Q. Mr. Toomey, are all the notes you made at the time of your interview with Mr. Staula contained in this report?

A. They are.

* * * *

[fol. 66] Q. Whether or not, Mr. Toomey, the original notes were in anyone else's custody from the time you took the interview until the time they were destroyed?

A. They were in my custody.

Q. Did you yourself, Mr. Toomey, destroy them?

THE COURT: I may say that at the time of the trial, from my memory, Mr. Koen made the statement the original notes had been destroyed and are unavailable.

MR. KOEN: I am not sure that I said that, sir. I reported that that was my information.

Q. Mr. Toomey, insofar as the original notes were concerned, in longhand, there is no photo or carbon of them now in existence?

A. There is not, sir.

[fol. 67] THE COURT: You remember, Mr. O'Donnell, this witness testified that he talked into a machine, isn't that right?

THE WITNESS: That is correct, your Honor, and it was taken off by a stenographer in Boston.

THE COURT: That record was sent up to Boston and taken off by some young lady in the main office of the F.B.I. and sent back to you and you said—you told me that in answer to Mr. O'Donnell's question that you compared it with the original notes that you made and then you destroyed the notes.

THE WITNESS: That is correct, sir.

* * * *

Q. Mr. Toomey, is it standard practice in all your interviews, after you get a transcript, to destroy your notes?

MR. KOEN: If that can be limited to the date in question or the period of time between July 1957 and the six or seven day period —

[fol. 68] Q. Was that your standard practice at that time?

A. It was the standard practice of the Department, not mine..

Q. Of the Department?

A. That is right, sir, the Department.

Q. Mr. Toomey, have you seen Dominic Staula since July 19, 1957?

A. Not to my knowledge, sir.

* * * *

[fol. 69] Q. When you used them—your report—in your report here, "On the five or six occasions Mr. Staula stated"—that phrase—and in certain instances you used quotes when you stated. You had in mind, did you not, sir, that he was making the statement to you?

MR. KOEN: My objection, may it please the Court for the question contains an incorrect statement. I think the question contained an incorrect statement as to the witness' testimony.

THE COURT: Mr. O'Donnell has covered it anyway.

Q. You used the word "stated" that he was making statements to you?

MR. KOEN: I pray your Honor's judgment.

THE COURT: I think you have covered that, Mr. O'Donnell thoroughly in other questions earlier. In cross-examination it was covered thoroughly.

He said that he made notes while he was talking to him, right?

THE WITNESS: That is right, your Honor.

[fol. 70] THE COURT: Your notes?

THE WITNESS: Yes.

THE COURT: Is there anything further, Mr. O'Donnell?

MR. O'DONNELL: Yes, your Honor, one last matter.

THE COURT: You said over a half an hour ago that you had one question and then you would be finished.

Q. I show you this report, Mr. Toomey, and what you have indicated in this report is what you wrote down, those notes coming to you from Dominic Staula in an interview?

MR. KOEN: As to what he wrote down as notes—

THE WITNESS: This is not a verbatim copy of the notes I prepared.

* * * *

[fol. 71] Q. Mr. Toomey, in respect to your notes and this interview report, is that made up from you interview notes, this report?

A. From my investigative notes, yes.

Q. All right. Is it substantially what is—excuse me—Now, is this a copy of those notes, this interview report (passing document)?

A. Not a word for word copy.

Q. You say it is not a word for word copy, the notes?

A. Yes.

* * * *

[fol. 73] Q. Now, Mr. Toomey, is there anything that was in your original longhand written notes that is not contained in this report?

A. No.

THE COURT: If you had asked that at the start, I would have allowed it.

Q. Now, Mr. Toomey, is there something in that interview report that was not in your original notes?

A. Yes.

Q. Yould you kindly point out to me wherein that is?

THE COURT: Let him point it out. His answer that he gave—he said there was.

THE WITNESS: What would be in the interview report that was or would not be in my original notes, is that the question?

MR. O'DONNELL: That is the question.

A. Inasmuch as my notes were destroyed approximately four years ago, I cannot recall completely, but such things as the name Norfolk County Trust Company—that [fol. 74] wouldn't appear in the notes, for I knew I was in the case along at that time. Such things as Canton, the Canton Depot, qualifying the name of the town in which the depot was, that possibly would not appear in my notes, for I knew it was in Canton immediately adjacent to the bank.

Q. Now, Mr. Toomey —

THE COURT: The witness had not finished his answer to your question when you took that away from him (indicating document).

MR. O'DONNELL: All right (returning document to witness).

THE COURT: I wish, Mr. Counsel, you would sit down while your associate is interrogating the witness. Mr. O'Donnell is doing what he thinks best.

A. Well, something such as the word "window" in the second paragraph, referring to the Teller's window. I undoubtedly put the word Teller Kennedy, rather than putting the specific word "window" in there.

Concerning description, it is my practice to abbreviate "S" for sex, "R" for race, height by Ht. Also, weight, by wt. Complexion, "Copl".

[fol. 75] Q. But as far as Staula, his answer to the question of "negro" and age "approximately 30 years" and that is the same?

A. Yes, that is the same, sir.

* * * *

[fol. 77]

AFTERNOON SESSION

Q. (By Mr. O'Donnell) Mr. Toomey, may I have your copy of the report again?

A. Yes. (Passing)

Q. Now, Mr. Toomey, except for the abbreviations that you pointed out to the Court and the adjectives, designations, this report is an exact copy of your notes?

A. No, it is not an exact copy of the notes which I took when I interviewed Staula.

Q. Would you now tell this Court wherein this report differed from the notes in your interview with Staula?

A. In preparing my notes I would not use the words "he said" or "he stated". I would have used key phrases and a quote when he was quoting directly.

But as far as what words are in the original notes, and what words are in this original form, I do not recall.

Q. Well, Mr. Toomey, does this interview report, have the same meaning as your notes?

A. It does.

THE COURT: You mean by that the same general

[fol. 78] meaning?'

THE WITNESS: Yes.

THE COURT: What do you mean?

THE WITNESS: I mean, your Honor, that it reflects the information.

THE COURT: You didn't take what he said to you word for word?

THE WITNESS: No, sir.

* * * *

[fol. 87] Q. When you concluded the interview, Mr. Toomey, when you concluded it with at the time some 15 years' experience as an FBI Agent, is it so, sir, that you had in your possession notes that you were satisfied were accurate from the interview you had just had with Dominic Staula?

A. That is correct.

* * * *

[fol. 103] CROSS-EXAMINATION

Q. (By Mr. Koen) Mr. Toomey, as I understand it, the robbery happened on July 18, 1957?

A. That is correct.

Q. On the following day you went to the Canton police station?

A. July 19, 1957—that is right.

Q. And you went there alone in that there was no other agent with you?

A. That is right, sir.

Q. And that you interviewed Dominic Staula?

A. That is correct.

Q. And when you interviewed Dominic Staula, there was nobody in that particular room, only yourself and himself?

A. That is correct.

Q. I think you said that it took approximately 30 minutes—

A. That is right, sir.

Q. And that you were in the room off the lobby in the main portion of the Canton police station?

A. That is correct.

Q. Isn't it a fact, sir, that you introduced yourself

to Mr. Staula, and Mr. Staula acknowledged intro-
[fol. 104] duction?

A. That is correct.

Q. Then the conversation reverted to the event of the preceding day?

A. Yes.

Q. And that Mr. Staula told you in his own words what had happened the day before—he told you the story as he remembered it?

A. That is my recollection, sir.

Q. So the interview was not in the form of a question and answer affair, was it?

A. Well, I asked him specific questions.

Q. At the outset he told you the story—

MR. O'DONNELL: May the witness finish his answer?

A. (Continuing)—after he told me the story concerning what he had seen the preceding day, I then asked him specific questions.

Q. So that he told you the story as he then for your purposes you asked him certain questions?

A. That is correct, sir.

Q. And when he was reciting the story to you, in a narrative form as distinguished from question and an-
[fol. 105] swer, you were making notes on paper in long hand?

A. That is right, sir.

Q. And he was talking to you in a rapid fashion when he—

MR. O'DONNELL: I object.

MR. KOEN: I'll withdraw it.

THE COURT: I allow it.

Q. Do you take shorthand, sir?

A. No, sir.

Q. Did you take it on that day?

A. I did not.

Q. And as he was telling the story, were you able to take down everything which he said, exactly as he said it?

A. Not word for word.

Q. Did you attempt to take down everything which he said exactly as he said it?

A. Not word for word.

Q. Because of the fact that you were taking this down in longhand, having in mind your capabilities, was it possible for you to get everything which he said down?

MR. O'DONNELL: Objection.

THE COURT: I'll allow him to answer that.

Q. Was it important for you to take down everything [fol. 106] which he said, word for word?

A. I do not recall how fast the man was talking—it was almost four years ago, but it wouldn't be my practice to write down every single word he said.

Q. And since it was not your practice to do it, is it your statement now—or is it your statement now that you did not do it on this occasion?

MR. O'DONNELL: I object. He said four years ago.

Q. This is a different question, may it please the Court.

MR. O'DONNELL: He always said he did not know.

MR. KOEN: May I have the question?

(Question read)

MR. KOEN: I withdraw it.

Q. Having in mind, sir, that it was your practice or when interviewing people that you did not take down word for word what they said, is it your memory now that the same practice covered the interview with Staula on July 19, 1957—would that be your best memory?

A. That would be my best memory.

Q. Then it is a fact that the notes that you prepared in Canton on that day did not contain everything which [fol. 107] Staula said?

A. No, sir, they did not.

Q. And in addition to that, I think you said that it contained among other things key phrases and abbreviations—

A. And the quotes, sir.

Q. And quotes also?

A. I did.

Q. Now, at any time while you were in the Canton police station on this day, did you show Mr. Staula the papers or the papers on which you had made these notes?

MR. O'DONNELL: Objection, your Honor.

THE COURT: I'll allow that question.

A. No.

Q. Did you, sir, in the Canton police station, on the 19th of July, have any document in final form for Mr. Staula to sign?

A. No.

Q. Did you at any time ask him for his signature?

A. No, I did not.

Q. Did you ask him to put anything in writing?

A. I did not.

Q. Did he put anything in writing on this day to your [fol. 108] knowledge?

A. For me?

Q. Yes, for you.

A. No.

Q. Did he on this day make any writing in any form and furnish it to you?

A. No, he did not.

Q. After the interview was completed did you return to your office in Brockton?

A. That is correct, sir.

Q. By the way—

A. Let me interject there—

Q. I'll withdraw the question—

What time of the day was it when you and Mr. Staula parted?

A. I cannot recall the way it was—it is my recollection it was in the morning.

Q. So that it is safe that it was before noon?

A. I believe it would have been before noon, I am not certain on this.

Q. Did Mr.—did there come a time that day when you returned to Brockton?

A. There was, sir.

Q. Can you tell us the approximate time that you [fol. 109] returned to Brockton that day?

A. It was very late in the evening, sir, that I returned —probably 9 o'clock or 9:30.

Q. That is when you again took your notes and dictated them into the Dictaphone, right?

A. That is correct.

Q. Dictated to the Dictaphone from your notes, correct?

A. Correct.

Q. Now, of course, from the time you had left Mr. Staula until the time you got to your office in Brockton, in the evening, you had been doing other work in connection with other cases, not all in connection with this case, right?

A. That is correct.

Q. Before we get to the point where you took your notes out for the purpose of using the Dictaphone you said to counsel for the defendants that there were certain things that were said by Mr. Staula on that day that were not in your notes, and were not ultimately in the transcribed report of the interview, is that correct?

A. That is correct.

Q. Could you now tell us what some of these things were which were said by Mr. Staula on this day which [fol. 110] you left out and if they relate to the incident of the previous day?

A. At the beginning if it was brought out, I would have introduced myself to him. I recall interviewing this witness that—that he said he was approaching the Teller's window and had his cash and realized that there was a robbery taking place, and put the money in a side pocket, and that there was a little talk of the fact that they were not getting "my money if they were robbing the bank."

He wanted to relate having been locked in the vault, and I remember him expressing quite a bit of fear of being locked in this vault. That did not appear in my notes.

* * * *

[fol. 111] So having in mind, sir, the fact that there were at least two things which Mr. Staula said to you on this day which you did not include on the interview report, is it fair to say, sir, that this interview report was the summary of an oral statement which represented material submitted by him and selected by you for inclusion in that report?

MR. O'DONNELL: Objection, your Honor.

THE COURT: Do you understand the question?
THE WITNESS: I do, your Honor.
THE COURT: I allow it.
A. It did.
Q. And this was prepared after the interview without the aid of complete notes and by complete notes I mean only with the aid of key phrases and abbreviations, which you made during the course of the talk and conversation, right?
MR. O'DONNELL: Object, your Honor.
THE COURT: I understood him to say—what methods he used—
THE WITNESS: I had complete notes with respect to the pertinent information on this witness.
[fol. 112] Q. Using key phrases or abbreviations, and one quote?
A. Yes.
Q. So when I say it was prepared without the aid of complete notes, I mean complete notes except those as you now recite. Is that a fair statement?
A. Yes.
Q. And having in mind that outside of the one direct quote, sir—that you relied on key phrases, abbreviations, so that the nine hours after the happening of the events involved in the interview, and with the business schedule in between—
MR. O'DONNELL: I object.
THE COURT: Yes.
MR. KOEN: Strike out the question.
Q. Having in mind that the interview about which you were reporting, having been complete about noon, having in mind that you were using notes which embraced one direct quotation, some abbreviations and many key phrases, and having in mind that you went about your business for approximately nine hours between the end of the interview, and the using of the Dictaphone, it is fair to say, sir, that you relied a great deal on your [fol. 113] memory of what transpired, isn't that a fair statement?
MR. O'DONNELL: I object.
THE COURT: I exclude it.

A. No, sir, I said that I relied primarily on the notes.

Q. But as you said the notes refreshed your memory as to what transpired?

MR. O'DONNELL: Objection.

THE COURT: Excluded.

Q. When I say you refreshed your memory it was your memory as to particular key phrases that refreshed your memory, correct?

A. Right.

Q. That report which you were questioned about, sir, does not purport to be an exact and a correct statement from Mr. Staula, does it?

MR. O'DONNELL: Object.

THE COURT: I'll allow it.

Q. Exact and correct is the phrase, sir?

A. Qualify what you mean exact and correct.

Q. Exact meaning word for word.

A. No, it isn't word for word.

Q. And as a matter of fact in this report, sir, there are several words which are your words, rather than [fol. 114] Mr. Staula's? That is correct, isn't it?

A. That is correct.

Q. So that when you got back to Brockton, armed with your notes, as they refreshed your memory, and with the key phrases, you then set the thing up in more or less chronological order, did you not?

A. Yes, I did, sir.

Q. Before you dictated?

A. Yes, sir.

Q. And it could not be an exact and a correct statement of Mr. Staula, because among other things, that is couched in the third person, is it not?

MR. O'DONNELL: Objection, your Honor.

THE COURT: I'll allow it.

Q. Isn't it?

A. It is.

Q. Sure. Now, have you the statement, please, sir?

A. Yes. (Producing same).

THE COURT: When you say couched in the third person, what do you mean by that—what do you mean, Mr. Koen to mean?

THE WITNESS: In that interview report?

Q. It is not in the first person, is it?

A. No, it isn't.

[fol. 115] Q. Not in the second person?

A. No.

Q. So it has to be in the third, right?

A. Yes.

THE COURT: What do you mean by third person—I will withdraw the question.

Q. Now, sir, taking the particular interview report—in the second line of that report there is a phrase, "a customer at the victim bank"—that is a quotation, and that is one which is yours, isn't it?

A. I believe it is.

Q. Did Mr. Staula say, "I went to the victim bank?"

A. I have no recollection of him saying it in that manner.

Q. Did he say "I was a customer at the victim bank"?

A. I don't recall him saying that.

Q. So that this verbiage then—is yours, rather than Mr. Staula's—yours rather than Mr. Staula's.

MR. O'DONNELL: Objection, your Honor.

THE COURT: I'll allow it.

A. That is correct.

Q. Sure. I think you have already told the Court that Mr. Staula did not use the name Norfolk County Trust Company?

[fol. 116] A. Correct.

Q. Or that he probably did not say that—?

A. I believe, sir, that I said he probably did not say that, nor did I enter that name in my notes.

Q. Coming down to the—

THE COURT: When you say "probably" you gave that as your best recollection?

THE WITNESS: Yes, your Honor, my best recollection.

Q. Coming down to the fourth line now—there appears the word or phrase—"to transact some business". You do not mean to say that Mr. Staula said to you "I went down there to transact business?" He didn't use that phrase, did he?

A. I would not recall, sir.

THE COURT: Please try to answer.

MR. O'DONNELL: I object.

THE COURT: If he can recall.

Q. If he can't, it is all right. Thank you. That is more like a phrase you would use.

MR. O'DONNELL: I object.

Q. Is that a phrase which you have used often in writing reports, sir?

[fol. 117] MR. O'DONNELL: I am objecting.

THE COURT: I'll allow it.

Q. It is a phrase you use quite frequently, sir?

A. Yes.

Q. I think you told the Court in answer to a question by counsel for the defense that on the subject of the interview with Mr. Staula, he probably did not use the words "Canton depot", right?

A. That is probably my phraseology, sir.

Q. Then again coming down to another portion of the statement on the interview report rather—it says—it was stated by Mr. Staula that he went to the Teller's window, which was served by Mr. Kennedy—

A. Yes.

Q. Now, those do not purport to be the exact words used by Mr. Staula, do they?

A. Not the exact words.

Q. That is your verbiage as to phraseology?

A. That is correct.

Q. Then there is the phrase, further down in the statement, talking of the cash which Mr. Staula had in his hands—the deposit—I'm sorry. There is a phrase "and slid them into his side trouser pocket." He didn't [fol. 118] use the word "trousers", did he?

A. He could have—I cannot recall.

Q. You are not too sure of that whether that—whether those were his exact words or not, are you?

A. Nothing unusual about that.

Q. In connection with that, sir, was there something else which Mr. Staual said, which you had not included in your report?

A. That is right, sir.

Q. What was that?

A. I can recall that Mr. Staual remembered and stated, rather that he immediately recognized there was a bank-robbery going on and he had not as yet deposited his money, and he realized that if this money was taken, it would be his personal loss, and that he made the statement to the fact that he did not want to lose the money personally, whereupon he slid it into his pocket.

Q. Was the phrase "I outsmarted them" used?

A. Something to that effect "cuted them" or "outsmarted them."

Q. Then going on further, this statement—this phrase "in the center of the lobby for an instant." Did he use the word "lobby"? Do you remember?

[fol. 119] A. I cannot say whether he did or not.

Q. Is that a word supplied by you?

MR. O'DONNELL: I object. He got an answer.

THE COURT: Could I have before me—you know what it is, and Mr. Koen does, but I have to find out facts. I have got to rule a certain way. It is clear as the noonday sun. I have to decide it. It is hard to spell out words, but it is not going to be easy.

I have to keep my mind free. If I feel there may be any legal harm done—I have to judge what these words mean. I have been trying to follow it.

Q. Now you have just told us another instance, sir, of a remark that was made by Mr. Staula, that you had not incorporated in this interview report, correct—"outcuting" or "outsmarting"—

A. Something to that effect, sir.

Q. So that what you did, was to listen to him, making notes and incorporating in the interview statement things which you thought were pertinent to the matter which you were investigation, right?

A. That is correct.

Q. And it might have been very well, other things [fol. 120] which might have been pertinent that you did not include which you personally did not think pertinent?

MR. O'DONNELL: Objection.

THE COURT: I'll allow it. I want to get his state of mind. I do not believe there was anything the witness said which was pertinent that was not recorded.

A. There might have been, sir, which I felt was not pertinent that I did not include.

MR. KOEN: Objection. That is not an answer to my question. I would like to have the answer.

"There might have been". I object to what might have been. He told us what was. And what did happen. I press the question.

THE COURT: I will allow the question. I am allowing it in the light of your answer.

He is asking you if it could be probably that there were things which you felt were not pertinent and left out—I am not asking provisions. I am willing—you can do it.

A. There might have been other things which I believe were not pertinent, and which I did not include in the interview report.

MR. O'DONNELL: I object.

[fol. 121] THE COURT: I exclude that. Yes, "that might have been".

* * * *

[fol. 123] Q. (By Mr. Koen) In this report, when you were first referring to the type of automobile used by Mr. Staula—you used the phrase "driving a vehicle", right?

A. Correct.

Q. That is the way Mr. Staula referred to the automobile while you were talking to him by truck?

A. That is my recollection.

Q. And yet there appears in the next sentence following the first reference to that, the word "vehicle"?

[fol. 124] MR. O'DONNELL: I object to this.

THE COURT: I'll allow it.

Q. Is that a correct statement, Mr. Toomey?

A. That is correct.

Q. So the word "vehicle" was a word supplied by you rather than Mr. Staula?

MR. O'DONNELL: Objection.

THE COURT: I'll allow it.

MR. O'DONNELL: There is no foundation.

MR. KOEN: What foundation? This is cross-examination, sir.

You have given counsel for the defense and myself the right to cross-examine, haven't you, your Honor?

THE COURT: That is right. You can to your heart's content.

I give full opportunity for cross-examination on everything. You may have the answer.

A. Vehicle is the word I used quite frequently, and it could be my word or Mr. Staula's.

Q. You do not know which?

A. I do not know.

Q. And in the next portion of that report—is it fair to say, isn't it, Mr. Staula, he did not say to you "I [fol. 125] went to the teller's window served by Mr. Kennedy", those aren't his words, are they?

MR. O'DONNELL: Objection.

THE COURT: Allowed.

Q. That is your interpretation of what he said?

A. That is correct.

Q. What he said?

A. Yes.

Q. Sure.

THE COURT: You found out that Mr. Kennedy was at that window?

THE WITNESS: Yes, your Honor.

Q. Then there appears the phrase "observed these individuals no further". That phrase was used by Mr. Staula, was it?

A. Not to my recollection.

Q. And that again is your recitation in this report as to some remark which he made and your interpretation of it, correct?

MR. O'DONNELL: Objection.

THE COURT: Allowed.

Q. That is correct?

A. Yes.

Q. "That he did as directed and observed these individuals no longer". That appears there, doesn't [fol. 126] it?

A. Yes.

Q. That doesn't purport to be the verbiage of Mr. Staula, does it?

A. It is my paraphrasing of what Mr. Staula said.

Q. And your interpretation of the words which he used?

A. Correct.

MR. O'DONNELL: I object.

THE COURT: I'll allow it.

* * * *

[fol. 127] SECOND DAY

March 15, 1961.
10:30 a.m.

JOHN F. TOOMEY, RESUMED

CROSS-EXAMINATION, CONTINUED

* * * *

Q. For purposes of clarification, yesterday in answer to a question by counsel for the defendants, you said that the interview report was not an accurate transcript of your notes as such?

THE COURT: That is what he said.

MR. KOEN: I am asking him—

THE COURT: Read the question.

(Question read.)

THE COURT: I'll allow it. This is cross-examination.

A. The interview report is an accurate transcript of my notes.

MR. KOEN: Of your notes?

[fol. 128] A. Not of my notes.

Q. Answer my question, please—did you say yesterday that your interview report was not an accurate transcription of your notes as such?

A. It is not an accurate report as such.

Q. That is because they consisted of only key phrases, of abbreviations, and only one direct quote?

A. That is correct.

Q. Now, and I think you also said that—

THE COURT: That was what you testified to—

MR. KOEN: That is what he said, sir.

MR. O'DONNELL: That is what Mr. Koen hopes he said.

THE COURT: No, that is what he said. You just answer the question. I can have the court reporter get your testimony.

Q. I think you also said that you made use of these phrases only in relation to things which you considered pertinent at that time?

A. That is correct.

Q. So that I think you said there were certain things which you left out of your notes?

A. That is correct, sir.

Q. And it certainly follows that you have left those [fol. 129] out of the transcript of the interview report?

A. That is correct.

Q. So that it is a fair thing to say, sir, that you selected certain portions of the remarks of Mr. Staula, right?

A. That is correct.

Q. Then when you got to Brockton at 9 o'clock that night you took your notes out, read them over, but you used the Dictaphone, correct?

A. That is correct.

Q. You then proceeded to set the notes up in chronological order, correct?

A. That is correct.

Q. And you also set up the statement in proper grammatical terms?

A. That is correct.

Q. As the notes and the abbreviations and the single direct quote refreshed your memory as to the portions of the remarks which Mr. Staula made?

A. That is right, sir.

Q. And you told us that you, of necessity, paraphrased some of Mr. Staula's remarks, correct?

MR. O'DONNELL: I object.

MR. KOEN: I withdraw it.

[fol. 130] In the preparation and the dictation of this interview report, you paraphrased it, did you not?

MR. O'DONNELL: Object.

THE COURT: I'll allow it to stand.

Q. And in the course of refreshing your memory from the notes and the abbreviations and the one quote, you put into the interview report—

THE COURT: Do you know what paraphrase means, Mr. Witness?

THE WITNESS: My understanding of it is, your Honor, that—

THE COURT: When you paraphrase, do you mean that you put it in your own words?

THE WITNESS: Put it in my own words, yes.

Q. That is what we were doing at the close of the court yesterday, showing entries where you had things in the report which you said were your words instead of Staula's?

A. Words are not only used in dictation—

Q. So the notes and the abbreviations, serve to refresh your memory, right?

A. Correct.

[fol. 131] Q. And at 9 o'clock that night you were taking that after arranging it chronologically, and paraphrasing it, you were recording your impressions of what the witness said?

A. That is correct, sir.

Q. And you gave your version of what the witness said, right?

A. That is correct.

Q. And in the course of reducing it to a statement on the Dictaphone—I'll withdraw that. In the course of dictating the interview report ther to the Dictaphone you had previously interpreted these key phrases and what they meant to you, right?

MR. O'DONNELL: I object.

THE COURT: I'll allow it.

Q. So actually, Mr. Toomey, this interview report, is the summary in the third person of the result of the interview with Mr. Staula as you remembered it, correct?

A. Correct.

Q. And it contained your version of what Mr. Staula had said?

[fol. 132] MR. O'DONNELL: I object.

THE COURT: I'll allow it.

A. That is correct.

Q. Now, there came a time, five or six days after you dictated this, sir, that the report or the copy which

you had here in the court was received by you at the Brockton office?

A. That is right, sir.

Q. When, with reference to the receipt of the report, which you have had here in court, were your notes destroyed—when, in point of time, before or after receipt?

A. After the receipt.

Q. And the destruction of the notes, sir, was it in accord with general practice and custom of agents in the Bureau at that time?

A. It was, sir.

Q. Was it consistent with and and in conformity with, instructions and directions which were then in operation?

A. It was, sir.

Q. And had those instructions been outstanding and in existence for a long time prior to July of 1957, to your knowledge?

A. They had to my knowledge.

[fol. 133] Q. That was occasioned by the fact that you had then received the interview report and the original hand notes served no useful purpose thereafter?

MR. O'DONNELL: Object.

Q. So far as you were concerned?

MR. O'DONNELL: I object.

THE COURT: This is cross-examination—I can't understand your objection.

The objection is serving no purpose as far as he is concerned.

That is a question—

MR. O'DONNELL: The phrase "no useful purpose"—they had been put to a purpose.

THE COURT: Wait—that would be for the Court.

MR. O'DONNELL: It would be extravagant to say it serves no useful purpose for the reports in court here today—conceivably—

MR. KOEN: I meant the original hand notes, sir, as distinguished from the report.

THE COURT: He said that within a week or so, it was sent back and that was in 1957 that he read it over and destroyed it, right?

THE WITNESS: Yes.

[fol. 134] THE COURT: In conformity with the custom and practice.

THE WITNESS: That is correct.

MR. KOEN: I have no further questions of this witness, sir.

RECROSS EXAMINATION

Q. (By Mr. O'Donnell) Mr. Toomey, who was the special agent in charge July 19, 1957?

A. Mr. E. J. Powers—

MR. KOEN: Wait a minute, please.

* * * *

[fol. 137] Q. Did Mr. Staula furnish a writing to any agent in addition to you, Mr. Toomey—

MR. KOEN: If he knows. I have no objection if he knows.

A. He did not furnish any writing to me.

* * * *

[fol. 140] Q. How did you destroy your notes?

A. I destroyed them by placing them in the confidential trash basket in my office which is burned.

Q. Well, you tore them up?

A. Yes.

Q. That is a confidential trash basket?

A. Yes.

Q. I see. Was it your decision alone to tear them up?

A. Yes.

Q. That was a matter of discretion with you—you could decide—"I am going to tear up these notes"—

[fol. 141] THE COURT: Now, I am going to exclude that, for the witness said it was custom and practice—didn't you say that yesterday?

THE WITNESS: I did, sir.

MR. KOEN: And consistent with regulations.

THE COURT: He followed regulations—you covered that yesterday.

If you want to ask questions in accordance with the answer he gives you, I won't stop you.

Q. Now, you say destroying the notes was in accord with the regulations, right?

THE COURT: He said it was in accordance with custom, regulation and practice.

MR. KOEN: Consistent with regulations.

Q. So in keeping with the regulations you destroyed the notes?

THE COURT: He said custom and practice and regulation—didn't you say that yesterday?

THE WITNESS: I believe I did yesterday.

THE COURT: If you said it, it was correct?

THE WITNESS: Yes.

MR. KOEN: Today he said it.

Q. In keeping with the regulations, isn't that so, Mr. Toomey—isn't it—in keeping with the regulation?

[fol. 142] A. Yes.

* * * *

[fol. 144] Q. You used the word "key phrases". What do you mean by key phrases?

THE COURT: Please, please—

MR. O'DONNELL: That was to Mr. Koen.

THE COURT: That was covered—he used it and in cross-examination that word "key phrases" was used by you.

It was by him in answer to your question.

THE COURT: All right—what do you mean by key phrases—tell them.

[fol. 145] THE WITNESS: Certain statements that at a later date would recall to my mind what the witness said.

THE COURT: Abbreviations?

THE WITNESS: Yes, that is correct.

Q. Well, it is so, isn't it, Mr. Toomey, that in regard to your notes you were able to produce this document that we have here in court and was incorporated into the United States Supreme Court's opinion?

MR. KOEN: May I have that question again, please?

THE COURT: Obviously—

Q. You were able to produce this document from your notes?

A. From my notes, I dictated this document.

* * * *

[fol. 146] Q. Now, Mr. Toomey, showing you this report, you said that you took down this report on an 8 x 10 blank office paper—did you use a pencil or a pen?

THE COURT: I exclude that. That has been covered. Don't answer it.

MR. O'DONNELL: Just a question—

THE COURT: No, no. It has been covered.

Q. (Continued) Did you use a pencil or a pen?

THE COURT: All right. I'll let that in.

A. I generally use a pen and I probably did that day.

Q. There is a report in your hand, and here is an 8 x 10 block of paper, sir, and would you write down the type of a report, looking at that type of notes that you took from Dominic Staula?

MR. KOEN: I object.

THE COURT: I exclude it.

MR. KOEN: I can't see the materiality of it.

THE COURT: I exclude that.

MR. O'DONNELL: I can clear it all up.

THE COURT: It does not need clearing—

MR. KOEN: I object.

MR. O'DONNELL: It will be fair to say that you have taken thousands of interviews?

[fol. 147] Your Honor, that would be vital to have him now show us his technique—

THE COURT: If you don't mind, I am the Judge sitting here in this Court, to carry out a mandate, and in deference to you and everybody else, when I exclude something, that is the answer to it. I have excluded it.

MR. O'DONNELL: Objection.

THE COURT: Have you any questions that would show that this man has the original statement in his possession—if so, I will certainly not exclude that. I want that understood. I mean the original notes. I would not hesitate.

MR. O'DONNELL: May the record disclose that I gave the pad, a pad, 8 x —or 8½ x 11 with blue lines and a pen, with this interview report to reproduce his technique of note-taking.

You went into the technique, and the word "technique" is peculiar to you.

I don't know what it means.

MR. O'DONNELL: Mr. Toomey, will you tell this Court what technique you used in taking your notes?

THE COURT: No, no. He went into it yesterday. [fol. 148] Exclude it.

* * * *

[fol. 150] Q. Mr. Toomey, when you indicated to Mr. Koen that you read notes over to refresh your memory, do you recall telling Mr. Koen that—

A. I do.

THE COURT: He told you that, too, yesterday. He told you that.

Q. Now, that was to refresh your memory—it was for the purpose of remembering what Dominic Staula told you—that is so, isn't it?

A. That is correct.

* * * *

[fol. 155] Q. Mr. Toomey, the first sentence of your report—"Mr. Dominic Staula, home address 259 Highland Street, Stoughton, Massachusetts, a customer at the victim bank, advised that he arrived at the Norfolk County Trust Company in Canton, Massachusetts to transact business, at approximately 10:15 a.m., July 18, 1957"—

THE COURT: Please, please.

Q. Where did you abbreviate or use key phrases in that sentence?

THE COURT: It has all been covered. The short phrases he used. It has been covered.

[fol. 156] MR. O'DONNELL: I would like to go over the nature of his report.

THE COURT: No, no. You have gone over it only yesterday.

I would like to let you do it, but I am not going to let you do it. I don't want to cut anyone off.

Q. You said yesterday, Mr. Toomey—

THE COURT: I would like to bring Staula in but I cannot.

Q. You said yesterday—Mr. Toomey, you said you left words out. What word or words did you leave out?

THE COURT: No, no. That has all been covered now, Mr. O'Donnell—every bit of it has been covered by this witness. It was covered on cross-examination.

Q. At any time since you took the report, Mr. Toomey, have you discovered with all your experience that you took an erroneous report?

MR. KOEN: Pray your Honor's judgment.

THE COURT: Exclude it—

Q. Isn't it so, Mr. Toomey, that you had your notes written in narrative form?

THE COURT: No, no. He covered that.

[fol. 157] Q. Isn't that so?

THE COURT: Please, Mr. O'Donnell—don't answer any questions, Mr. Toomey.

MR. O'DONNELL: Objection.

Q. I would like to get at the nature of the report.

THE COURT: You got at it yesterday thoroughly and there is no doubt about it. After you read over this testimony. I'll say now if there is any basis on which you can predicate or even create a doubtful situation, I shall permit you to do it again—have this witness again—I am not going to close this up. I am going to get the stenographic transcript and read it. You find out from it, yourself, and point it out. I stand by what I say.

Q. Mr. Toomey, did you have occasion at the interview with Dominic Staula to talk with him on the telephone?

A. Not to my recollection, sir.

Q. Would you keep a note of that fact—you keep a note of every contact that you would have with Dominic Staula, would you not, sir?

A. In what way do you mean?

Q. Whether by phone or in person?

A. With respect to what, sir?

[fol. 158] Q. What reason did you have to have a contact with Dominic Staula?

THE COURT: He hasn't said that he did.

THE WITNESS: Any subsequent—no.

Q. On July 19, 1957?

A. Yes.

THE COURT: At the bank.

Q. Do you want to leave your testimony here before this Court that insofar as this eye witness is concerned, that you only had one conversation with him, this one constituting an interview on July 19, 1957?

A. I never recall any subsequent conversation with Dominic Staula.

Q. Whether in person or by phone?

A. That is correct.

Q. Would you have the notes in your office that would reflect every contact you had with Mr. Staula, even if you cannot now recall?

A. No.

Q. Also your testimony is that the only time you saw Dominic Staula was during this interview report?

A. That is my only recollection of having seen this man.

[fol. 159] THE COURT: Was it at the bank—rather, at the police station after the robbery?

THE WITNESS: Yes.

Q. Now, at the present time here in this court, can you say with certainty whether or not your phrases are used in this report?

THE COURT: Pardon me, you have gone over all that thoroughly, all before me, yesterday. It was in cross-examination by you and cross-examination by Mr. Koen. It has been covered.

Q. Whether or not, Mr. Toomey, at this date you would be certain whether or not phrases could have been yours or Staula's?

THE COURT: Pardon me, that has been covered carefully. Do you object to it, Mr. Koen?

MR. KOEN: I don't, Judge. I think my original objection was that these questions were well beyond your ruling of yesterday, and you have permitted him to ask them. This is a question which was covered by him in his cross-examination yesterday as with many of these.

THE COURT: I'll exclude it.

MR. KOEN: I do not want to be accused of foreclosing these defendants of their right to be heard because certain things were said which I find or feel were not

[fol. 160] warranted by my actions, and I do not want to be the recipient of others.

THE COURT: Not by the Court?

MR. KOEN: Not by you, sir, no. I think—but it is better left unsaid.

THE COURT: I have excluded it.

MR. O'DONNELL: Objection.

THE COURT: (Continuing)—because it has been covered.

Q. Mr. Toomey, the information contained in this report that you have here is information supplied to you by Dominic Staula?

THE COURT: That has been covered.

MR. KOEN: Objection.

Q. Well, anyway, Mr. Toomey, may I say everything that you had in your notes is contained in this report, that is so, isn't it?

THE COURT: I am not going to have that. It has been answered. Unless it is something new, as I have told you.

MR. O'DONNELL: Objection.

* * * *

[fol. 166]

LEO LAUGHLIN, SWORN

DIRECT EXAMINATION

Q. (By Mr. O'Donnell) What is your name?

A. Leo Laughlin.

Q. Your business or occupation?

A. A Special Agent in charge of the Federal Bureau of Investigation, the Boston Division.

Q. And Mr. Laughlin—

THE COURT: Where does this cover—all New England?

THE WITNESS: Massachusetts, Rhode Island, New Hampshire, and Maine—four States.

Q. How long have you been so employed with the Federal Bureau of Investigation?

A. In my present capacity?

Q. As an agent?

A. December 2, 1935, 25 years and 4 or 5 months.

Q. How long in your present capacity?
A. Boston or elsewhere?
Q. Boston?
A. About three and a half years.
Q. And you commenced here in about September?
A. September 21, 1957.
[fol. 167] Q. Now, as agent in charge you have certain duties?
A. Yes.
Q. Your duties are prescribed by regulations within your department, are they?
A. Many of them are, yes.
Q. Do you say your department, meaning the Federal Bureau of Investigation, functions by rules and regulations?
A. We do.
Q. And these rules and regulations, do you have them in your office as Special Agent in charge for New England?
A. Yes.
Q. And how do you have them filed—what would be your technique or file number for rules and regulations?
A. They would come in loose-leaf notebooks.
Q. And printed up there?
A. Yes.
Q. And available to be read?
A. That is right.
THE COURT: They have to be read, do they not?
THE WITNESS: Oh, yes, yes, your Honor.
Q. Do your subordinates, special agents, do they function under the rules and regulations?
[fol. 168] A. Yes.
Q. And those rules and regulations are propounded from what source?
A. They are issued by Headquarters.
Q. And that would be down at Washington, D. C.?
A. Yes.
Q. Are they issued under the authority of any individual?
A. They are issued on the authority of J. Edgar Hoover.

THE COURT: And these are the regulations which have the force and effect of Federal statutes?

THE WITNESS: No, sir, they are administrative. These are administrative regulations.

THE COURT: On that he is right.

Q. Now, you are here as a consequence of a subpoena served on you by me yesterday, asking you to bring in any rules and regulations, giving the conduct of agents for interviewing eye witnesses to crime; for example, examining people as to bank robberies—in fact, on or about July 19, 1957, with special reference to notes taken during the interviews, did you, sir, in answer to this subpoena bring with you the rules and the regulations referred to in the subpoena?

[fol. 169] A. I did not, sir.

Q. Now, I ask you, Mr. Laughlin, you have already told us with your 25 years' experience that your department functions under rules and regulations, isn't that so, sir?

A. Yes.

THE COURT: Functions under other things besides rules and regulations?

THE WITNESS: It does, your Honor.

Q. In failing to bring in what was requested in or by this subpoena, did you have a conference regarding this subpoena, yes or no?

A. Yes.

Q. Were you told by Mr. Koen not to comply with the request of what you should bring into court, yes or no?

A. Yes.

MR. KOEN: Did you hear that last question, sir?

THE WITNESS: Yes, I did.

MR. O'DONNELL: I object to Mr. Koen instructing the witness.

THE COURT: Mr. Laughlin should have heard the question and he should have answered it.

MR. O'DONNELL: He did answer it, your Honor. I assume that Mr. Koen was disappointed in the answer.

[fol. 170] Q. Mr. Laughlin, it is so, isn't it, sir, that you had a discussion with Mr. Koen regarding what you

should bring in with reference to this subpoena and what it requested?

A. Yes, I did have such a discussion.

Q. Isn't it so, sir, that as a result of a conversation with Mr. Koen, you are now in court without any of the rules and the regulations requested by the subpoena?

A. No, sir.

Q. Did your conversation with Mr. Koen concern the question in the subpoena as to what you should bring with you?

A. Yes.

Q. What did you say to him in that conversation?

MR. KOEN: I pray your Honor's judgment—never mind, I withdraw the objection.

A. I read the subpoena to Mr. Koen, showed it to him and told him that we had certain regulations in our organization which required me to communicate with my headquarters immediately upon the receipt of subpoena which I did.

I told him I was awaiting instructions from my headquarters.

[fol. 171] THE COURT: What do you mean?

THE WITNESS: Washington, sir.

Q. You told Mr. Koen you were awaiting instructions from Washington?

A. Yes, because I am aware of the departmental order 3229 which we use for the reason for not producing official records of our organization.

Q. I see—with your 25 years' experience, Mr. Laughlin, you realized that the command in that subpoena from a United States District Court is one that you place and regard as having a higher authority than your headquarters?

MR. KOEN: I object.

* * * *

[fol. 179] Q. (By Mr. O'Donnell) Now, Mr. Laughlin, you have rules and regulations governing the conduct of special agents in their duties, generally?

A. Yes.

Q. Now I ask you specifically, they have rules and regu-

[fol. 180] lations governing the conduct of an agent interviewing eye witnesses to a bank robberty?

A. We wouldn't have a specific ruling or regulation covering that, sir.

Q. When you say a specific rule and regulation, however, you do have rules and regulations?

A. No, sir, no, sir. We do not.

Q. So it is your testimony, here in this court that your Bureau does not have any regulations governing an agent interviewing an eye witness to crime?

MR. KOEN: I pray your Honor's judgment. That is not—

THE COURT: That is not the way—you have rules and regulations—

MR. KOEN: My objection, but—

THE COURT: I'll clear it up. I know what it is. You have rules and regulations in connection with the procedure by which you can conduct an investigation in connection with a violation of the Federal statute, and the purpose of it is to either exonerate someone or you make an investigation for the purpose of investigating or detecting, or getting evidence and it results in arrest of someone.

[fol. 181] THE WITNESS: May I make a comment, your Honor?

THE COURT: Yes.

THE WITNESS: We have rules and regulations and we have instructions as to how an interview is to be conducted.

We do not have any rules and regulations covering the actual conduct of an interview as such.

THE COURT: There are rules and regulations in connection with the investigation of matters that come within your purview or scope of the Federal Bureau of Investigation, isn't that right?

THE WITNESS: That is too broad, your Honor.

We may have rules and regulations governing the particular aspects of an investigation, but not rules and regulations covering the conduct of an agent at the time of an interview as such, sir.

Q. So if you were to produce your rules and regulations, there would be nothing in them referring to the mechanics of an interview?

A. Actual conduct, yes.

Q. Would they refer in any way to an interview?

A. Well, that is a broad question.

Q. Did they encompass interviews conducted by agents?

A. Well, we would have some regulations which might [fol. 182] encompass an interview in a particular type of an interview.

* * * *

[fol. 183] Q. Now they have rules and regulations regarding the conduct and investigation of crime?

A. Again, sir, it is too broad—I cannot answer the question yes or no. I can say we have no rules or regulations covering the conduct of an interview in a bank robbery case, sir.

Q. All right.

A. Specifically I can say that.

THE COURT: That is right. You mean charting a course by which an agent would ask questions of a witness as distinguished from investigations which a man is taught when he comes into training school?

THE WITNESS: Yes.

* * * *

[fol. 184] Q. Mr. Laughlin, is an agent left to his own, on his own, when he is conducting an interview that he employ whatever should occur to him at the time, for conducting an interview?

A. After he has his basic instructions for training, sir, which is reinforced periodically by training courses—yes, he is on his own.

Q. And you will agree with me that that is an important phase of the functions of your Bureau, interviewing people?

[fol. 185] A. Yes.

Q. And that important phase is governed by rules and regulations?

A. No, sir.

Q. No rules and regulations?

THE COURT: He has answered that.

MR. O'DONNELL: Fine, fine. Okay.

THE COURT: I am not going to allow you or anybody else to get inside the structure of that setup or inside that structure, of their training. They are trained to become investigators, detectives, and so forth and they give refresher courses as he said, and a man is supposed to be experienced, and know how to do it.

Q. Do they give you or give them lectures on how to take interviews?

THE COURT: No, he has already said that.

Q. What is the custom for taking an interview?

THE COURT: Excluded.

MR. O'DONNELL: I object.

Your Honor is definitely preventing me from getting evidence.

THE COURT: I am not letting you play hide and seek with this witness. He has explained to you what [fol. 186] he does. You have a right to get these records but you are not going to find out in this manner.

MR. O'DONNELL: If I have a right to get the records, I ask you that you order the witness to bring in the rules and regulations asked for in the subpoena that is marked as an exhibit.

THE COURT: I have ruled these questions do not concern them. I have not passed on that as yet. I haven't passed on it. You have not raised it. You are trying to find out what a fellow does when he goes out.

MR. O'DONNELL: Your Honor—

THE COURT: Here is a robbery, apart from a guilt that was committed in a bank, three men went in there, terrorized 22 people, threw them into a vault, terrorized them, and threatened to shoot them, and got $32,000 under the control of the Federal Government.

MR. O'DONNELL: May I have a ruling on my motion?

THE COURT: Whatever was done, they went ahead as they would go ahead with a kidnapping and he has told you what they would have to do.

[fol. 187]

MOTION FOR RULING RE SUBPOENA AND RULING THEREON

MR. O'DONNELL: May I have a ruling on the motion that this witness be ordered to bring in the rules and regulations?

THE COURT: You haven't asked for it as yet.

MR. O'DONNELL: I certainly did in the subpoena, and I am asking for it now again.

THE COURT: All right, what about the rules and regulations?

MR. KOEN: I am now going to ask the Court, and I am moving that the—may I have that subpoena, please, sir? Thank you sir.

Now, the subpoena, as I have it here, subpoena duces tecum, reads "and bring with you any rules and regulations governing the conduct of agents when interviewing eye witnesses to crime; for example, bank robbery, in effect, on or about July 19, 1957, with special reference to notes taken during interview."

I ask that, first of all, that this witness be relieved of complying with the request contained in the subpoena duces tecum for he has on two occasions at least said that there are no rules and regulations governing the conduct of agents and the manner in which they usually conduct [fol. 188] interviews of prospective witnesses and if that be not sufficient, I move that the subpoena be quashed on the basis that it is a general request, does not require specific documents, and is broad and wide enough in its scope to be classified as a pure fishing expedition, and I so move.

THE COURT: Have you some authority for this?

MR. KOEN: I am using a phrase used in the Jencks case. I do not cite it as authority. That is my position. It may be remembered in connection with my motion, that the remarks which I made to the Court indicate that Mr. Hubley stated to counsel for the defendants, that even though Mr. Laughlin was not in a position by virtue of restrictions imposed upon him by his headquarters in Washington, that he was authorized to testify as to policy, practice and procedure in general.

I would think that anything that might be contained in the regulations which is pertinent to this hearing, might very well be testified to by Mr. Laughlin and obviate the necessity of producing any documents.

[fol. 189] THE COURT: He has already said there were no rules and regulations governing the investigations of witnesses in bank robberies.

MR. O'DONNELL: Not as a blanket statement, sir—

THE COURT: Would you like to make a statement, sir—would you like to make a statement?

THE WITNESS: No, I have to restrict it to bank robbery, sir. There may be different types of investigations which—for which there may be rules and regulations covering it—I only testify here as to the rules and regulations in bank robberies.

MR. KOEN: And I would presume, sir, that that is about what we are interested in, in this case.

MR. O'DONNELL: If the subpoena says, your Honor, investigation of crime and naturally we are in the dark—we use the expression, for example, bank robbery.

We take the position that rules and regulations exist and we are again looking to get at the nature of the interview report of the same thread that we were working on through the previous witness.

We want to get the nature of the interview report on [fol. 190] rules and regulations surrounding it.

THE COURT: You had three hours to get at that yesterday, and we listened to it again today. He says there are no regulations laid out for bank robbery cases, correct?

THE WITNESS: Yes.

THE COURT: So the motion is denied, Mr. O'Donnell.

* * * *

[fol. 192] MR. KOEN: May it please the Court, for the purpose of protecting myself on the record, as a result of remarks by counsel for the defendant, I say this to you, sir, that I never advised Mr. Laughlin at any time to produce or not to produce records. On the contrary, the statement which I read in court, which counsel agreed to, says "We would not file a motion to quash subpoenas"—Mr. Hubley gave this to Mr. O'Donnell and

Mr. Lewison yesterday afternoon. "We would not file a motion to quash subpoena prior to Mr. Laughlin taking the stand, but instead would let Mr. Laughlin produce [fol. 193] such regulations as were deemed by us to be pertinent to this hearing."

* * * *

THE COURT: The motion has been denied and that's all there is to it. * * *

* * * *

[fol. 196]

AFTERNOON SESSION

Q. (By Mr. O'Donnell) Mr. Laughlin. do you have regulations in the giving and taking of interviews for crimes generally?

MR. KOEN: I object on the basis that we are concerned with—

THE COURT: That is right, exclude it.

Q. Now—

MR. KOEN: As I have stated before, I have no objection to any questions dealing with the method of taking interviews.

MR. O'DONNELL: I am not interested in what you are stating for the record.

MR. KOEN: Would the counsel allow me to finish my statement which I am trying to make?

I stated before recess, and I will state now, if the questions are confined to anything dealing with the crime of bank robbery, which is the basis on which the indictment is returned—I'll have no objection, but I don't think this is the form in which to question with reference to general practices of the Bureau. The statement issued and before me is a narrow one of issues and you know what it is. [fol. 197] It made a request that Mr. Staula be interrogated—

Q. Will an agent—

THE COURT: Wait a minute—made a request he be interrogated—he came back here for determination, because I interrogated him.

I did it because it was the best way to determine.

His answers are in the Opinion of the Court. The issue before me is whether or not this statement was a report—a substantially verbatim statement that was given by Staula, among other things, and that is what I have decided—this Bureau is tied down—the fine head of this Bureau, and if it is a ground for reversal, I am willing to be reversed.

Q. Mr. Laughlin, are agents expected on interviews with witnesses to get complete statements from the witness they are interviewing?

MR. KOEN: I am going to object to the expectation aspect of that.

THE COURT: Yes, I am going to exclude it.

MR. O'DONNELL: Objection.

[fol. 198] Q. To give your agents instructions as to what to do during interviews?

A. They receive training to that effect, yes.

THE COURT: He has said that—that they receive training.

THE WITNESS: Yes.

Q. And during the training, what are they told?

THE COURT: No, no. I'll exclude that.

MR. O'DONNELL: Objection.

THE COURT: You don't think I am going to open up a Pandora box as to what these men receive secretly in a training necessary to prepare them to protect society?

MR. O'DONNELL: Your Honor, what I want to get at is the nature of the interview.

THE COURT: You want to open it up to—you want the whole country to know. I am excluding the question.

MR. O'DONNELL: I want to get at the nature of the interview conducted by an agent.

THE COURT: No further comments—I have excluded the question, and I want no further comments—understand—and your objection is noted.

[fol. 199] MR. O'DONNELL: Objection.

Q. Well, anyway, Mr. Laughlin, agents do conduct interviews?

A. Yes.

Q. Agents function under rules and regulations?

A. Yes.

Q. And during an interview there are certain rules they must comply with?

MR. KOEN: Rules?

I object, because I think the witness has already said there are no such rules.

MR. O'DONNELL: I wish Mr. Koen would have the decency to stand up if he objects.

THE COURT: There are no rules or regulations on robbery cases. I don't want you to ask that question again, Mr. O'Donnell. I have excluded it at least twenty times.

Q. Mr. Laughlin, do you have rules governing the destruction of original notes?

A. Yes.

Q. And in your 25 years with the Agency, is or has it always been your policy to destroy original notes of interviews?

A. Yes, it has been.

[fol. 200] Q. There are, however,—

THE COURT: No, no. That is all. I am not going to have you explain or give out to the world what the situation is when you have your reports, understand, in contradiction to a statement that the report is then destroyed.

THE WITNESS: When a man returns with his notes, and he reduces the result of the interview to the report or the memorandum, official record, then he may destroy those notes unless he feels that it will be of some assistance to him in testifying in court.

THE COURT: Is he under any obligation to retain notes—can he destroy if he wants to?

THE WITNESS: It is optional.

Q. Are you going to put it this way—

THE COURT: Please, please. I am not going to let you ask any other questions. I am not going to let you interpolate what he says.

MR. O'DONNELL: I haven't even asked the question —I haven't gotten it out.

THE COURT: He answered it. That is the reason why. You go ahead with the next question.

MR. O'DONNELL: Your Honor, I contend that he has [fol. 201] not answered it.

MR. KOEN: —can answer any question I haven't asked.

THE COURT: Go ahead and ask it then.

MR. KOEN: He started off—"Are you going to put it this way?"—he stopped—he did not finish his question.

THE COURT: Go ahead.

Q. Is it up to the agent to decide whether or not to destroy those personal notes?

A. It is, and if for any reason he wants to keep them, he has to discuss it with the agent in charge.

Q. Doesn't the regulation provide that he shall keep the original notes if it is reasonable to expect that the case will go to court?

A. No, the regulation does not read that way.

Q. How does it read?

THE COURT: Please, please. He is not going to give you any regulation, he has been told by his department head what to do. He has told you what they are and that is all there is to it.

Q. Now, Mr. Laughlin, in response to a subpoena that I caused to be served on you, what instructions did you [fol. 202] receive from Washington?

THE COURT: Now, hasn't that been read in this statement ?

MR. O'DONNELL: No, your Honor.

THE COURT: I won't order you to answer that unless you want to.

A. I was instructed to recite policy concerning the retention or the disposition of notes. I have been instructed —under the provisions of executive order, departmental order 3229 not to produce any of our rules and regulations.

Q. You say these notes become an official record in your department, what do you understand the official record to contain?

THE WITNESS: I don't think I said that.

MR. KOEN: That was my objection, sir. The witness did not say any such thing.

Q. What becomes of the notes?

THE COURT: He didn't say any such thing. Didn't you say that, Mr. Witness—what did you say?

THE WITNESS: I said the man dictates the results of the interview from his notes, and they are generally destroyed.

Q. What happens to the contents of the interview—it [fol. 203] is now translated.

A. It is transcribed, the man now dictates it, reads it, comparing it with his original notes, and after that, when he is satisfied that it is a true reflection of what he dictated, he initials it, and he then destroys his notes generally.

Q. When he is satisfied that it is a true reproduction of what he dictated from his notes, that is right? In order for that to be a true reproduction he has to be first satisfied that it is what he was told?

MR. KOEN: Objection.

THE COURT: Please, I beg your pardon—I am going to exclude that.

MR. KOEN: How can this man testify as to what an agent might think?

THE COURT: It has been gone into very carefully.

MR. O'DONNELL: I object, your Honor.

THE COURT: I don't care whether you object or not. Don't you object to my making a statement, for I am making it to correct the schisms that you are trying to put into this case. Let's get the truth of it.

We have a strange, a very strange government, if they [fol. 204] had to produce their rules and regulations, and a yardstick for their investigation for every Tom, Dick and Harry in a situation where this country is having a very, very dangerous rendezvous with destiny.

MR. O'DONNELL: I'd say this courtroom isn't any Tom, Dick and Harry.

THE COURT: They should not be obliged to give it to everybody. I am certain Congress, the Congress of the United States, never intended that everyone should have it.

Q. What is an agent supposed to do during an interview?

THE COURT: I exclude that.

MR. KOEN: That's all right—I have no objection.

THE COURT: I have an objection, and I am excluding it.

MR. KOEN: I am perfectly willing to let him answer.

THE COURT: All right, then.

A. He is supposed to obtain such information as he can from that individual concerning the particular topic under investigation.

Q. Now, do you expect that the agent will rely solely [fol. 205] on his memory as to what occurred at an interview or do you have any provision—is he under any duty to do anything during the interview?

THE COURT: I'll exclude that.

* * * *

[fol. 207] THE COURT: Go ahead, Mr. Lewison.

Q. It is so, Mr. Laughlin, that frequently there is a great deal of time that expires between the time an inter-[fol. 208] view is made or taken and the time that the case comes up for trial?

A. No, sir. May I ask what do you mean by "a great deal of time"?

Q. There can be several months to a year, perhaps, between the time of an interview during an investigation?

A. Yes, yes. Excuse me. I misunderstood the question.

Q. So that as a matter of fact, there comes a time when the agents confer with the government attorneys in preparation of a case for trial?

A. Yes.

Q. And agents are not necessarily assigned to any one case at a time—they have a great number of matters of business at hand which they attend to as they go along?

A. They may or may not, sir. They may have one or several—you are right.

Q. So that—by the way, do you dispatch Federal F.B.I. agents to the Federal Building to confer with government attorneys in the preparation of trials?

MR. KOEN: What does he mean by "dispatch"?

MR. LEWISON: I am sorry, your Honor, I resent the interference.

[fol. 209] THE COURT: I don't know what it means myself. I assume that what you mean is that if the United States Attorney wants to see some agents in the Federal Building—he gets them down there—he may send them down there.

Q. Mr. Laughlin, do you understand me, if I ask you, do you dispatch men to various places or to a government building?

A. Do I send them?

Q. Yes—you understand.

A. As a matter of practice I do not. Assistants will call the agents or call maybe a supervisor. They might call me and ask for a particular agent, yes, and I would send an agent in response to the request, yes.

Q. That is part of their duties to go to the government attorneys and prepare or confer in the preparation of a trial?

A. Yes.

Q. And when they do so, they take their files with them whethey they be of a confidential nature or not, isn't that so?

A. No, they cannot take a file, sir.

Q. Well, let me ask you this—perhaps the word "file" [fol. 210] is too inclusive.

A. Yes.

Q. Would they take their portion of the investigation which has been reduced to writing from the file with them?

A. Again they may or may not. Usually the United States Attorney will have a copy of that report, sir.

Q. When a particular agent goes to court in preparation for trial—he is available to the government attorneys in all respects for the preparation of that case, such as going out and re-contacting witnesses previously interviewed, and being available themselves as witnesses and that type of availability for trial work, isn't that so?

A. They are available generally, yes.

Q. Due to the interval of time that can elapse to which we have just referred to earlier and the amount of work which a particular office may assign to its agents, they rely and certainly refer to interview reports which they made out for the purposes of preparing their testimony, isn't that so?

MR. KOEN: I object.

MR. LEWISON: Do you understand my question?

[fol. 211] MR. KOEN: My objection is this, that the question assumes something which has not been the subject of testimony. The question assumes that—

MR. LEWISON: It is more admissible as evidence than anything that has come along.

THE COURT: I have a simple issue. I know what you have in mind—that would be admissible in the trial of the main case, but it is not admissible before me in this narrow situation. I would allow you to ask that question in that case.

Q. Mr. Laughlin, let me ask you, what is the purpose or the purposes defined to an agent taking interview notes?

A. The purpose is to get such details as he can to enable him to come back to his office and to dictate or to put on a record a transcription record of the general tenor or truth accurately of the interview.

Q. When you say "general tenor" actually you must include all relevant material matters pertaining to the subject matter of the investigation which the agent has received from the witness?

A. That would be the objective, certainly.

[fol. 212] Q. Certainly.

THE COURT: They want to determine relevancy or value, that it would be to the United States Attorney, right?

THE WITNESS: That is true, yes.

Q. In obtaining your interview report you have a procedure that you follow, or that the training tells these men to do without regard to what will happen in the court in the future—by that I mean, Mr. Laughlin, that you do not confer with the U. S. Attorney every time you take a report during an investigation, do you?

A. No, sir.

Q. Experience and training has taught you as a special agent of the F.B.I. what he must have from a witness in order to present it to the United States Attorney?

A. That is what is expected.

MR. KOEN: Pardon me, sir.

THE WITNESS: It is what he is expected to do.

MR. KOEN: Yes. Thank you.

Q. An agent will inquire of a witness, matters to refresh a witness' memory or to call his attention to things perhaps that the witness himself has overlooked?

[fol. 213] A. I may or may not.

Q. In other words, he wouldn't necessarily take a witness' statement at face value and drop it there?

A. He will ask questions—he will question the witness.

Q. All pertinent information which he derives from the witness, he would reduce to writing in his notes?

A. He will make notes.

Q. Notes of what the witness told him?

A. Yes.

Q. And those notes are generally made in long hand at the scene of the interview?

A. Yes.

Q. Those notes are in generally narrative form?

A. I doubt that—I doubt that, sir. If you mean in sentences?

Q. Yes.

A. No, sir.

Q. A statement is never written out so that it can be shown back to the witness and asked if that is what he said?

MR. KOEN: I pray your Honor's judgment.

THE COURT: Read the question. No, I am inter-

[fol. 214] ested in what this agent, this witness did that day when he interviewed them.

Q. Is it the custom and practice of the—

THE COURT: If he wasn't there—he didn't see the statement.

Q. It is the custom and the practice of F.B.I. Agents to follow out their instructions received in training—

THE COURT: I have not allowed instructions to be gone into.

Q. Is there anything of a confidential nature about the instructions given an agent in taking an interview, Mr. Laughlin?

THE COURT: I allowed some of the instructions to go in.

MR. LEWISON: You have allowed some of the instructions to go in, your Honor, please?

THE COURT: I allowed this witness to testify to some of these questions—not in the rules and regulations. I did not use that phrase to this witness in any disrespectful sense. I used it with deference and respect to the position you have, sir.

Q. Isn't it the practice of a special agent of the Federal Bureau of Investigation to write down what witnesses say to him and to read it back to the witness that he is [fol. 215] interrogating?

MR. KOEN: I pray your Honor's judgment.

THE COURT: I am going to exclude that.

MR. LEWISON: Objection, your Honor.

THE COURT: The witness has testified that he refreshed his recollection after taking the memorandum and asked him questions with reference to the contents of this memorandum after he took it. That is before me and the corollary for the question arises from this and there is no need of setting it forth, just what it is.

Q. Do instructions to the FBI Agent include anything about checking the accuracy of his notes with the witness he is taking them from?

THE COURT: I am going to exclude that.

MR. LEWISON: Well, your Honor, in a nonadversary proceeding, I don't know how we are going to ascertain—back in 1957,—he has been interviewed and interrogated now for five hours have the instructions or the regulations for the FBI covering interviews changed any since the passage of the Jencks Act.

MR. KOEN: Pray your Honor's judgment.

THE COURT: The passage of what Jencks Act—[fol. 216] you mean every decision which came down which resulted in the enactment of a statute. I suppose the next thing you are going to ask this witness is what he thought of the Jencks decision.

THE COURT: Exclude that.

MR. LEWISON: I haven't asked that, your Honor.

THE COURT: I know you haven't. It became necessary for Congress to pass an Act as a result of the Jencks decision, and it is statute 3500. It is an Act of Congress.

Q. Now, Mr. Laughlin, do you have in your training procedure practice interviews with an agent of the FBI so as to teach them by instructions and example how to take an interview and what to do with the results of his interview notes?

THE COURT: Now, I am going to exclude that.

MR. LEWISON: If your Honor please, may I say that—

THE COURT: I am not interested in what took place at that time, and I am not trying out the efficiency or the fidelity to service, and I am not reflecting in any way at the fine men in the service, but I am interested in what took place, and I get involved in five and a half hours of cross-examination, the last two days.

[fol. 217] I have excluded it, and you may go to the next question.

MR. LEWISON: We had some answers from the previous witness.

THE COURT: No comment. You can have your objection noted.

MR. LEWISON: May I state our purpose of examination for the record?

THE COURT: No. I know the purpose for the examination—I am not going to admit it. Put it in the record, whatever you say you feel you should do, but I am excluding that.

MR. LEWISON: I feel that then I should state for the record your Honor's instructions, that the previous witness stated it had been custom and usage in the FBI service and I should like to question someone with the eminence and qualifications of one such as Mr. Laughlin, Agent, about the custom and the usage, practices and training of an Agent in the taking of these statements and witness interviews.

THE COURT: You have gone over it for several days. It has been covered.

MR. LEWISON: We cannot seem to reach an ultimate—

[fol. 218] THE COURT: How is a man with 150 Agents under his supervision to know—is he supposed to go to work and analyze every statement that an Agent

ever—every investigative statement or investigate the report that an agent has ever made?

What did Mr. Toomey—what was the situation in that matter—that is the issue before me. I have been very generous about this.

Q. Perhaps by inquiry we can ascertain those facts as to what the chief agent does.

THE COURT: You have been on it for approximately four and a half hours. You ask a question, get a thought from that and ask another one.

These things have been covered, that is why I am doing it.

* * * *

[fol. 221] Q. What instructions does an agent receive, Mr. Loughlin, about proving or checking the accuracy of his notes after an interview with the witness?

A. He is taught to go over them with the witness and inquire whether the story is as he has it, is a recitation of the story as the man gave it—the witness gave it.

Q. If he receives approval of it, the witness, he goes [fol. 222] back and dictates the notes and makes his office report or memorandum, as you call it?

MR. KOEN: Pray your Honor's judgment.

Q. If he receives the approval of the witness, he goes back and dictates his notes?

THE COURT: I'll exclude all of that.

I have to find—I am talking about what took place at that time—that day.

MR. LEWISON: That question, your Honor, was a logical sequence to the answer I received previously.

THE COURT: I have ordered it stricken.

MR. KOEN: It is a conclusion, sir. It seems a conclusion, sir.

THE COURT: It is not—the FBI is not responsible—it is what that man did.

He was an authorized agent of the FBI. He interrogated him thoroughly. I don't know whether he carried out instructions or if he didn't. I am only interested in what he did.

MR. LEWISON: Was the previous question excluded, your Honor?

THE COURT: That is right.

MR. LEWISON: Objection, please.

THE COURT: And the implications flowing therefrom [fol. 223] are excluded too.

Q. Now, if he is told by the witness that in some respect or respects, his notes do not reflect accurately what the witness told him, then he is expected to change the notes so that they do reflect what was told, right?

MR. KOEN: I pray your Honor's judgment. I don't know if there is evidence that that was done.

MR. LEWISON: If your Honor please, I think I am entitled to the courtesy of the question—of being able to finish my question before an objection is raised.

THE COURT: There is no such evidence in this case. If there was, I would let it go in.

MR. LEWISON: There is evidence in this case, your Honor—

THE COURT: I have excluded it and I want no comment—if I find there is, when I go over it, I'll give you a chance to do it. I have been following it very carefully.

MR. LEWISON: Objection.

THE COURT: I am going to have you note your objection. I am giving you the right to do that. I don't [fol. 224] say I am going to allow you or let you reopen this case, but if you give good cause, I'll do it, if there is a modicum of evidence one way or the other. But I am not going to reopen it either for the government to try or for the defense.

The evidence is in—and like evidence in every other case, there comes a time when we must close the case. I will give you all a chance to read over this transcript. Get that very clearly.

* * * *

[fol. 228] Q. Now, Mr. McLaughlin, were you in the Boston office of the Federal Bureau of Investigation in 1957—

A. What part, sir?

Q. What parts are there to the F.B.I. office?

A. During 1957—

Q. Yes.

A. I was there part of the time and I went—

Q. I am talking about—I mean the portion of the year —I mean from July 18, 1957 on.

A. I wasn't here, no, sir.

Q. Thank you. When did you arrive in Boston?

A. I think the exact date was September 21, 1957.

THE COURT: Transferred from where?

THE WITNESS: From Washington.

Q. When you arrived here were you immediately made agent in chief then?

A. Yes.

Q. Did you have anything to do with the so-called Canton bank robbery?

A. Did I have?

[fol. 229] Q. Did you take charge or did you look into or supervise any portion of the investigation of that case?

A. No, sir. Just overall—it was in the office and I was aware that it was in the office, but I did not participate actively in it.

Q. Were reports made to you?

A. Records were submitted. Not to me.

Q. You did not look over any reports involving the Canton bank robbery case?

A. No, sir.

Q. Is there anyone in your office—anyone else in your office who could give an agent permission to retain original notes besides yourself?

A. No, sir, under the rules, the special agent in charge is the person who is to give permission.

THE COURT: Otherwise, they are destroyed?

THE WITNESS: That is to be done, yes, your Honor.

* * * *

[fol. 237] Q. You have no particular rule or regulation that is applicable to bank robberies, right?

A. Right.

Q. Your rules would pertain to any type of crime that [fol. 238] would be emcompassed within your particular rule—in other words, they would not repeat a rule, item for item, saying bank robbery, truck robbery, grocery store robbery—they would give you one set of rules.

A. Rules and regulations concerning what, sir?

Q. About the taking of the interview notes and the recording thereof, during or after a crime?

A. There would be a general rule.

Q. Yes.

A. Concerning taking of notes.

Q. And—would you tell us the number of or the caption of that rule?

A. I have no recollection or memory of one.

Q. You have no memory or does it come under your work directives?

A. I have no memory.

Q. Tell us what that rule states.

A. The taking of the notes?

Q. Yes.

A. He is especially to take sufficient notes to enable him to record the story or evidence or testimony recited to him.

Q. Is that your conclusion or is that a statement of [fol. 239] the rule?

A. That is my understanding of the rule.

THE COURT: Mr. Toomey stated all that himself.

MR. KOEN: Would you finish the answer, please—

THE COURT: I didn't think he had more. He is entitled to finish, this witness. I think he finished, but you may finish it.

A. (Continued) So he could come back to the office and dictate an official report or memorandum reflecting the general tenor or result of the story as told to him by the witness.

Q. And it is the witness' story that he recorded, and not his own version of it, isn't that so?

MR. KOEN: I object.

THE COURT: Exclude it.

Q. What does the rule say about what he reports?

THE COURT: I am going to exclude anything further on rules. He has answered it.

MR. KOEN: Objection, your Honor.

THE COURT: I have excluded it.

MR. LEWISON: May I now request that your Honor instruct this witness to bring that one particular rule into court?

THE COURT: No, sir. I am not going to ask him—I [fol. 240] am not going to ask him to produce any rule that the Department head told him not to produce for you or anybody. I won't ask him to do that. I am one Judge that is not going to do it. I do not defy anybody, but I have got a lot of grandchildren and a lot of respect for morals—and I have got to think of the safety of the home and the protection of abodes of peace of men which they are entitled to have. I make no such order.

MR. LEWISON: I submit this rule does not involve what you—

THE COURT: I have said that I will not order it produced. I do not know whether there is a rule or not. I am not going to ask him.

MR. LEWISON: He said there was a rule, your Honor please.

THE COURT: You are asking him to say that every time they take a statement, it must reflect fully what was in the man's mind.

MR. LEWISON: Not what was in the mind, but what he said to the Agent.

THE COURT: I won't go into that.

Q. It is fair to assume that if there were regulations, the agent followed them or it?

[fol. 241] THE COURT: I am interested in what took place that day.

Q. That is right.

THE COURT: There is no evidence, sir, before me, no indication that Mr. Toomey disregarded at all any rules or rights of the defendant. You are not going to fill in a niche here where there is no such a rule which would indicate that.

MR. LEWISON: I submit, Mr. Toomey followed them and in doing so the document is an admissible statement under the statute. It is admissible, and if he followed the rules properly, obviously that statement complies with the tone of the Campbell case and statute.

THE COURT: I have to decide this the way I have to —the way I am told to do. I have to decide this as a Judge of this court.

MR. LEWISON: If your Honor please, the Supreme Court cited the Burger case.

THE COURT: I don't care what your case is. I have given you every chance. I have indicated to you that I have given you wide latitude. I have never helped in an attempt to destroy a man nor to impeach his credibility. [fol. 242] Questions have been asked fairly and honestly —this is an attempt to impeach him.

MR. LEWISON: I assure Mr. Laughlin does not think so, and if he does, I apologize to the Court and to him. I say that I am trying to arrive at the questions of whether the FBI regulation would bring the notes within the tenor of the general statutes and the Campbell Opinion. That is what I would like to know.

THE COURT: Who is going to pass on this, you, Mr. Laughlin, or myself?

MR. LEWISON: Of course it is for the Court, your Honor please.

THE COURT: That is right.

• • • •

[fol. 245] Q. Mr. Loughlin, did your instructions from [fol. 246] Washington encompass a refusal to produce the rule or regulation just read or referred to earlier in answer to one of my questions concerning interview notes and reports?

A. My instructions were, sir, was not to produce any rules or regulations under the departmental order 3229.

THE COURT: By the way he said that to Mr. O'Donnell, right?

MR. O'DONNELL: He gave that answer, yes, for I asked him.

THE COURT: No, he said it when he came in here, that he read it. The subpoena was marked, right—after that—it was within a reasonable period.

Q. Did it say just to exclude things within the purview of the Rule 3229?

A. My instructions were, sir, not to produce any of our official records, or documents or instructions.

• • • •

[fol. 264]

IN THE UNITED STATES DISTRICT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION
May 1, 1961

McCARTHY, D. J. (Retired, sitting by designation)

This case affecting three defendants came on for a hearing before me as the result of a mandate from the Supreme Court of the United States in Campbell, et al v. United States, 365 U.S. 85, in the form of a remand without in any way ordering a new trial except under conditions set forth in the mandate itself and with the direction from the Supreme Court to hold a new inquiry consistent with the opinion rendered. I have done so, and I have tried to carry out this mandate. I gave counsel for the defendants and counsel for the United States government full opportunity to carry on with a full inquiry. A transcript of the testimony taken by a court stenographer covers 283 pages.

FINDINGS OF FACT

1. On July 19, 1957, Special Agent John F. Toomey of the Federal Bureau of Investigation interviewed Dominic Staula in regard to a bank robbery which had taken place in the Canton branch of the Norfolk County Trust Company, this interview taking place at the Canton Police Station on the day following the robbery.

2. The interview lasted about thirty minutes. No one was present in the room but Agent Toomey and Mr. Staula. In the course of the interview Mr. Staula told Agent Toomey, in narrative form, the story of his experience on the preceding day. Mr. Toomey, who does not have the ability to take shorthand notes, noted, in longhand, key words and abbreviations and one quote sufficient to recall to his mind the story told by Mr. Staula.

3. After hearing the story and asking specific questions intended to clarify the narrative, Agent Toomey repeated

to Mr. Staula, from memory and using the notes which he had taken only to refresh his recollection, the substance of the story which Mr. Staula had related to him. There was nothing in the reading of the notes back to Mr. Staula that indicated there was the slightest disagreement to the story as Agent Toomey related it.

[fol. 265] 4. Agent Toomey did not transcribe the story related to him by Mr. Staula word for word. Neither did he show the notes to Mr. Staula for approval, nor have him sign or initial the notes, nor did he obtain any written statement from Mr. Staula at any time. Agent Toomey saw Mr. Staula only on the one occasion of the interview of July 19, 1957.

5. It was not until 9 P.M. on the same day that agent Toomey returned to the branch office of the Federal Bureau of Investigation in Brockton, Massachusetts, which was his office, where he read into a dictaphone what was referred to as an Interview Report concerning his talk with Mr. Staula in accordance with the practice of the office. The recorded statement of Agent Toomey was then forwarded to the Boston Office of the Federal Bureau of Investigation for transcription and the completed report was returned to Agent Toomey in the Brockton Office in about five days. It would clearly appear there was no secretary assigned to this office and this was the medium by which the transcriptions were made, he being the only man assigned to the office in Brockton. The completed product was returned to Agent Toomey in about five days, and it truly reproduced what he had dictated.

6. I find that the Interview Report made by Agent Toomey is not a written statement made by Mr. Staula nor was it signed or otherwise adopted or approved by Mr. Staula.

7. I find that the Interview Report is not a stenographic mechanical, electrical, or other recording, or a transcription of such a recording, which is a substantially verbatim recital of an oral statement made by Mr. Staula to Agent Toomey. I further find that no substantially verbatim recital of an oral statement of Mr. Staula was recorded contemporaneously with the making of an oral statement by Mr. Staula.

8. I find that the original notes taken by Agent Toomey were not a written statement made by Mr. Staula nor was it signed or otherwise adopted or approved by Mr. Staula.

9. I find that the original notes made by Agent Toomey were not a stenographic, mechanical, electrical, or other recording, or a transcription of such a recording, which was substantially verbatim recital of an oral statement made by Mr. Staula to Agent Toomey. I further find that the original notes made by Agent Toomey were not a substantially verbatim recital of an oral statement of Mr. Staula recorded contemporaneously with the making of the statement.

[fol. 266] CONCLUSIONS OF LAW

1. The Interview Report was not a producible document within the meaning of subsection e (1) of § 3500 of Title 18 of the United States Code.

2. The Interview Report was not a producible document within the meaning of subsection 4 (2) of § 3500 of Title 18 of the United States Code.

3. The destruction of the original notes was not a noncompliance within the meaning of subsection d of § 3500 of Title 18 of the United States Code.

4. The original notes of Agent Toomey would not have been producible under either subsection e (1) or e (2) of Title 18 of the United States Code, if they had existed at the time of trial or if they existed now.

5. It follows that the motion for the production of pretrial statements of Mr. Staula, made at trial and open for redetermination at this time in accordance with the decision of the Supreme Court of the United States in this case, must be denied.

OPINION

In this unusual hearing I have attempted to follow the ground rules laid down for me in the opinion of the Supreme Court of the United States. I have denied the

motion made by counsel for the defendants for the production of Mr. Staula for examination in these proceedings in accordance with that opinion and because his testimony at trial stands as footnoted in the opinion of the Supreme Court of the United States, 365 U.S. 85, at pp. 89. I have not conducted this inquiry as an adversary proceeding; I have allowed both parties to examine and cross examine witnesses; I have not limited the scope of inquiry except as it became repetitive and, in determining the facts, I have not considered that either party had a burden of proof or of persuasion. Faced with the quandary of determining what standard of review of credibility to use, I have taken the testimony of the Agent Toomey, as recited at this hearing, and the testi- [fol. 267] mony of Mr. Staula, as given at trial, and have weighed the conflicts between the two as though this were ordinary testimony presented in a non-adversary civil matter, such as testimony received by the court to determine what allocation should be made of a fund recovered in an F.E.L.A. action wherein the decedent has left a widow and minor children. I have resolved the conflicts in the testimony as indicated by my findings of fact.

After hearing arguments of counsel I am not persuaded that the original notes or the Interview Report come within either sub-section e(1) or e(2) of Section 3500 of Title 18 for the following reasons:

There is no evidence which persuades me that Mr. Staula ever saw, read, signed, adopted or otherwise approved the original notes or the Interview Report.

Neither is there any evidence of a substantially verbatim transcription of a statement by Mr. Staula. I am puzzled by the statutory words "substantially verbatim" as they are used since I am of opinion that that which is substantial is not verbatim and vice versa. However "It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the govern-

ment agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on 'substantially verbatim recital', and 'continuous, narrative statements made by the witness recorded verbatim, or nearly so. . . .' . . . that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quotation out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provisions to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions." *Palermo* v. *United States*, 360 U.S. 343, 352-353.

[fol. 268]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 57-280-M

UNITED STATES OF AMERICA

v.

ALVIN CAMPBELL

JUDGMENT AND COMMITMENT OF ALVIN CAMPBELL—
May 1, 1961

On this 1st day of May, 1961 came the attorney for the government and the defendant appeared in person and [1] with counsel.

IT IS [2] ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty of the offense of Bank Robbery in violation of Title 18, United States Code, Section 2113(a), (b) and (d) as charged [3] in Counts numbered one through seven and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in accordance with the remand of the Supreme Court of the United States and after hearing and the filing of Findings of Fact and Conclusions of Law, the Court re-imposes the sentence of of twenty-five (25) years.

IT IS ADJUDGED that [5] the Defendant be credited with all good time served by him under the sentences of February 18, 1958 to date of this judgment, i.e. following filing of revocation of election not to commence service of sentence.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ William T. McCarthy,
United States District Judge.

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

A True Copy. Certified this 2nd day of May, 1961.

(Signed) John A. Canavan
Clerk

(By) /s/ Dorothy C. Clark

[fol. 269]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 57-280-M

UNITED STATES OF AMERICA

v.

ARNOLD CAMPBELL

JUDGMENT AND COMMITMENT OF ARNOLD CAMPBELL—May 1, 1961

On this 1st day of May, 1961 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of BANK ROBBERY in violation of Title 18, United States Code, Section 2113 (a) (b) and (d) as charged in Counts numbered one through seven and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in accordance with the remand of the Supreme Court of the United States and after hearing and the filing of Findings of Fact and Conclusions of law, the Court re-imposes the sentences of twenty-five (25) years imposed on February 18, 1958.

IT IS ADJUDGED that the Defendant be credited with all good time served by him under the sentences of February 18, 1958 to date of this judgment i.e. following

surrender of the defendant to Federal custody by the Commonwealth of Massachusetts.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ William T. McCarthy,
United States District Judge.

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

A True Copy. Certified this 2nd day of May, 1961.

(Signed) John A. Canavan
Clerk

(By) /s/ Dorothy C. Clark

[fol. 270]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 57-280-M

UNITED STATES OF AMERICA

v.

DONALD LESTER

JUDGMENT AND COMMITMENT OF DONALD LESTER—
May 1, 1961

On this 1st day of May, 1961 came the attorney for the government and the defendant appeared in person and [1] with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty of the offense of Bank Robbery in violation of Title 18, United States Code, Section 2113 (a), (b) and (d) as charged [3] in Counts numbered one through seven and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in accordance with the remand of the Supreme Court of the United States and after hearing and the filing of Findings of Fact and Conclusions of Law, the Court re-imposes the sentences of twenty-five years (25) imposed on February 18, 1958.

IT IS ADJUDGED that [5] the Defendant be credited with all good time served by him under the sentences of February 18, 1958, to date of this judgment, i.e. following

filing of revocation of election not to commence service of sentence.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ William T. McCarthy,
United States District Judge.

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

A True Copy. Certified this 2nd day of May, 1961.

(Signed) John A. Canavan
Clerk

(By) /s/ Dorothy C. Clark

[fols. 271-272] • • •

[fol. 273]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5847

ALVIN R. CAMPBELL ET AL., DEFENDANTS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN, and ALDRICH, *Circuit Judges*.

Melvin S. Louison and *Lawrence F. O'Donnell* for appellants.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—November 7, 1961

ALDRICH, *Circuit Judge*. The defendants were convicted by a jury of armed robbery of a bank under 18 U.S.C. § 2113. On appeal we affirmed. 269 F.2d 688 (1959). The Supreme Court granted certiorari, but limited its decision to the single issue of whether the district court had properly complied with the Jencks statute, so-called, 18 U.S.C. § 3500, in refusing the defendants access to an F.B.I. interview report of one of the government's witnesses, one Staula, for the purpose of impeachment. The court, in effect, suspended the convictions and returned the case to the district court for the purpose of making a further factual inquiry into the circumstances attending the report in order to de-
[fol. 274] termine whether defendants had improperly been denied access to it, or to any other paper. For the aid of the district court the court recited certain legal

principles, but it left undecided what consequence might flow from non-production, because of prior destruction, of an otherwise properly called-for document. The court held, *inter alia*, that it had been error to refuse access to the report on the basis of Staula's denial of its accuracy because that permitted the witness to immunize himself from impeachment; instead it directed the court to conduct, in the absence of the jury, a "non-adversary" hearing, at which Toomey, the F.B.I. investigator who prepared the report, would be cross-examined by the defendants. It held that it had been error for the court to tell the defendants that they could have Toomey only as their own witness. The court gave to the district court the option of calling Toomey itself, or ordering the government to call him. *Campbell* v. *United States*, 1961, 365 U.S. 85.

The hearing before the district court held pursuant to this mandate occupied an extraordinary amount of time. This was largely because of needless remarks by the court, although we are not unmindful that counsel contributed. While technically the court called Toomey itself and permitted the defendants to cross-examine, the restrictions imposed upon counsel were such that it was cross-examination in name only.[1] In spite of the fact that the witness was a special agent of long standing who had discussed his testimony with the Assistant U. S. Attorney immediately before the hearing, the court hovered constantly over him like an over-anxious mother. With respect to correla- [fol. 275] tion between the notes, Staula's statements, and the eventual report, the Supreme Court's directions for a non-adversary proceeding to assist the court in performing its duty, with the defendants permitted to cross-examine, were honored largely in the breach. The necessary cure for this will be for us to make our own interpretation of Toomey's testimony so as to give the defendants the benefit of every doubt and to draw all proper

[1] Defendants make much of the fact that they were ordered to cross-examine first. We see nothing improper in this; nor did defendants object at the time. The court's ruling that their re-cross could not go into matters covered by the government's cross, but only new matters, was perhaps an abuse, but understandable in the light of the repetitive nature of the original cross.

inferences in their favor. This we will proceed to do.[2]

The robbery occurred on July 18, 1957. Staula was a customer present in the bank, and an eyewitness. Toomey interviewed him in a room in the local police station the following morning. No one else was present. They sat at a table. Toomey talked with Staula, asked him questions, and took notes. The notes did not purport to be word for word, or even to use Staula's own words, except when specifically indicated by quotes. Toomey did not use shorthand, but occasionally used symbols and abbreviations. He recalled two omissions—the fact that when Staula put some money of his own that he had been about to deposit in his pocket he did so to "out-cute" the robbers, and that he feared being locked in the vault. But in Toomey's opinion, the notes were "complete . . . with respect to the pertinent information" Staula had given him. However, they were complete only with respect to subject matter; the notes were not a running account. This was further demonstrated by the fact that after Staula had finished telling his story and had answered Toomey's questions, Toomey recited back to Staula the substance of what [fol. 276] Staula had told him. He did not do so by reading his notes. Though he relied "primarily" on them, he depended also upon his memory. Staula answered in the affirmative Toomey's question whether he had the story straight. Toomey did not ask Staula to sign anything, or to initial anything, nor did Staula himself read the notes, although he was in a position at the table to have observed him writing.[3]

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[2] Another remedy would be to send this matter back for a further hearing before another judge, but we are satisfied that the factual issue is a narrow one and that it eventually was sufficiently explored so that the procedure we are adopting will accomplish full justice. There was a further question of whether Staula signed anything, and whether he should have been called as a witness, with which we will deal later.

[3] At the original trial Staula had testified that the F.B.I. had written down what he said and read it back to him and that he had replied that it was essentially what he had stated. He also had testified, "I think he gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now I am

Toomey testified that the interview had taken place in the forenoon; that it lasted half an hour; that he attended to some other matters during the day, and that that night he dicated his interview report into a machine. He stated that he first arranged the notes in chronological order, and then relying primarily on his notes, but also on his memory, dictated a report that "reflects the information in the notes." However, he used his own language. He did not believe, for instance, that the phrase in the report that "he [Staula] went to the teller's window which is served by Mr. Kennedy," and the phrase, twice repeated, that he "observed these individuals no further," were the witness'.[4] He testified that he sent the machine disc to the Boston office for typing; that he received the transcribed report back some days later; that he checked it against his notes, and on finding it accurate, destroyed the notes in accordance with standard F.B.I. practice. He did not [fol. 277] show this report to Staula, and, in fact, never saw him again after July 19.

On this record it is entirely clear that Staula agreed to the accuracy (and "approved," to use the statutory language) of what Toomey recited to him as his understanding as to his, Staula's, account on July 19. But it seems also clear on Toomey's testimony that what Toomey so told Staula that morning differed to some extent from what was in his notes, and, on both Toomey's and Staula's testimony (and there could be no other, so far as appears), differed also from what he put in the eventual report, although all may have been summaries of the same thing. Before considering the importance or consequence of these differences, we review the applicable principles as we understand them.

Neither the Supreme Court in its opinion, nor the de-

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not sure—I couldn't remember—." 365 U.S. 85, 89 n.2. On the other hand, on being later shown the investigative report Staula testified flatly that he had never seen it. 365 U.S. 85, at 97. The district court concluded that Toomey's version was correct, and we shall so assume for this portion of the opinion.

[4] Toomey also testified that he made "grammatical" changes. This may have meant only changing into the third person.

fendants presently, suggest that any paper here sought [5] is producible other than in accordance with 18 U.S.C. § 3500. *Palermo* v. *United States*, 1959, 360 U.S. 343, 360. A statement is not producible under this statute unless it is,

> "(e) . . . .
>
> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

This statute is by no means clear. It might well have been possible, as contended by the dissenters in *Campbell*, 365 U.S. 85, at 104, to interpret subsection (1) as limited to a [fol. 278] statement "written . . . by said witness," and subsection (2), in complementary fashion, as a statement given orally but written or otherwise transcribed by someone else. However, the court has construed subsection (1) to include a statement orally made by the witness and written by someone else. This broader construction must, in turn, cast light upon subsection (2). We must hold this latter to be limited to oral statements by the witness taken down contemporaneously by someone else in a particular fashion which produces a "substantially verbatim recital." Thus subsection (1) applies if the writing, even though made by someone else, was "signed or otherwise adopted or approved," although it did not follow the original statement substantially verbatim, while subsection (2) applies if the writing was substantially verbatim, even though it was not signed, adopted, or approved. This, in turn, must mean that a writing not specifically approved is not producible in spite of its general accuracy if it is not substantially verbatim.

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[5] The defendants seek the notes as well as the report, and on the basis that the notes have been destroyed, seek other relief. We will discuss this *infra*.

Before construing the particular statutory provisions it may be appropriate to turn to the legislative history. While it has sometimes been said that the only purpose of the act was to rectify lower court misinterpretations and enlargements of the *Jencks* decision, we must observe that public clamor about the consequences of that decision, and the incipience of Congressional action, was immediate and was, at best, only prophetic so far as judicial misunderstanding was concerned. See 103 Cong. Rec. 8290 (June 4, 1957). Eleven bills were introduced. It is evident that the primary consideration was protection of the F.B.I. A review of the Congressional history suggests, as is often the case in important legislation, that views differed as to the extent of the legislative protection desired. We believe it apparent that some of the proponents were more concerned with protection than they [fol. 279] were with merely "interpretation," and that their principal deterrent was apprehension as to the scope of due process.

Examining the statute as a whole, it might be argued at first blush that the only aim was the elimination of confidential matter and irrelevancies, as provided by section (c). However, it also appears that not every memorandum made by an F.B.I. agent as the result of an interview is to be indiscriminately reached even though it contains no such material. The F.B.I. has a legitimate interest in maintaining secrecy on a broad base. But it also may have an interest to some degree in the purely mechanical aspects of its operations in permitting its agents to take notes in such manner as they see fit (not to mention destroy them), or to make memoranda for their own use, without the spector hanging over them that such papers, with all of their possible imperfections, may be called for in court. Vivid, also, in the minds of all trial lawyers are the related problems of work products, *Hickman* v. *Taylor*, 1947, 329 U.S. 495. It can be readily understood that if a memorandum of a conference prepared by an F.B.I. agent which did not attempt to be substantially verbatim, and that had not been specifically adopted by the interviewed witness, is to be subject to production in court, freedom of operation of the agents would be considerably curtailed.

The framers of the bill may well not have wanted that impediment.[6]

The defendants complain that any restrictive interpretation would destroy the purposes of the act, which they assert was designed to protect prospective court defendants. It was even intimated that it was not only the duty of the F.B.I. under the act to preserve notes, but it was their duty always to take notes, so that a record might be [fol. 280] there to be kept. We could not entertain such a suggestion seriously. By the same token, we cannot believe that if the F.B.I. does take notes or make reports it must do so in such accurate form that they will be safely producible in court, or suffer the consequences. If, for any reason, valid impeachment material does exist, a defendant is entitled to have the benefit of it. But this is, in a sense, a windfall, rather than the performance of a duty owed. The word "windfall" may sound alarming, but either there is a duty owed or there is not. We do not find in the statute any such duty. The statute speaks simply of statements, meeting certain specifications, "in the possession" of the government, not statements which should be, or should have been.[7] The placing of new affirmative duties upon the F.B.I. would be entering a field for which we find no intimation in the legislative history, or justification in the statute.[8]

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[6] It may be noted that summaries were one of the most explicitly discussed objects of protection. See, *e.g.*, H.R. 700, 85th Cong. 1st Sess. 5, 11; 103 Cong. Rec. 15931, 15933, 16118, 16130, 16739.

[7] It may be noted, moreover, that Senator Clark at one time expressed objection to a narrow definition of statement on the ground that the F.B.I. might take advantage of it to keep its records in forms that would thereby not be producible. 103 Cong. Rec. 15933. The broader form he advocated was not adopted. In this connection we might observe that memoranda and reports falling without the statute are, from a trial standpoint, likely to be of no value to the F.B.I. if the witness for one reason or another goes back on them. To a large extent, therefore, the F.B.I. will want full records, and the problem raised by the senator will be self-rectifying.

[8] We are not in this context discussing the destruction of impeachment material in bad faith for the express purpose of avoiding its effect. No such issue arises in the case at bar.

Nor can the unavailability to defendants of statements which the witness did not specifically approve, or which were not substantially verbatim, represent a serious miscarriage of justice. Just as soon as a question arises as to whether a writing does in fact represent accurately the prior statement of the witness, collateral issues arise. If, in point of fact, the statement was not approved by the [fol. 281] witness, and is not a completely accurate representation of what he said, the resulting "impeachment" may be highly unfair.

Turning to the specific provisions, we do not find the words "substantially verbatim" easily construed loosely as, for example, "substantially accurate." We are not sure how far the reverse of the negative expressed in *Palermo* v. *United States*, 1959, 360 U.S. 343, 352-3, carries. Except to the extent that we must do so, we would not be disposed to agree with the dictum in *United States* v. *Thomas*, 2 Cir., 1960, 282 F.2d 191, 194, that a report prepared as a "substantially accurate reproduction of agent's original notes" may be "substantially verbatim" within subsection (2), particularly if that includes, as the court said in *United States* v. *Waldman*, D.C.N.J., 1958, 159 F. Supp. 747, at 749, (cited with apparent approval in *United States* v. *McKeever*, 2 Cir., 1959, 271 F.2d 669, 674) "an elaboration" of the notes. See also *United States* v. *Annunciato*, 2 Cir., 1961, 293 F.2d 373, 381. We believe that subsection (2) is directed to statements, which, lacking approval, substitute the guarantee of some means of transcription ("stenographic, mechanical, electrical, or other recording") which lends itself to a very high degree of exactness. This, in turn, permits a definite, and limited, inquiry by the trial judge into the efficacy of the means of transcription, rather than the indefinite, and often unsatisfactory pursuit of whether the writing was, in over-all substance, accurate. Congress used very precise language. ("Detailed particularity." *Palermo* v. *United States*, *supra*, at 349.) If all it meant was "substantially accurate," it would have been very much easier to say so. To us the length of debate on the subject of records vs. recordings, *supra* n. 6, is very revealing. A longhand writing which the court

found fairly followed the witness' words, subject to minor, [fol. 282] inconsequential errors, as is any "stenographic" reproduction, would fall within subsection (2). Neither in his notes, nor in his interview report, did Toomey even purport to do this.

The requirements of subsection (1) are quite different. Here Congress required approval (of non-substantially verbatim statements) by the witness' signature, or "otherwise." This is not directed to the agent's substantial accuracy, but to the action of the witness. In the case at bar, always considering Toomey's testimony by itself, it is true that Toomey wrote something before parting company with the witness. But he did not purport to show him the words that he had written, or to read those words to him. Lawyers and trial judges are quite familiar with witnesses who are willing to read over a written statement and state orally that it is correct, but are unwilling to affix their signature. But this is not the same as having an incomplete writing and elaborating it in recounting back to the witness what he is understood to have said, or then subsequently reducing the interview to writing in undoubtedly not the same words. Where the statute says "signed, or otherwise adopted or approved," by ordinary principles of *noscitur a sociis*, we think this means an approval comparable to a signature, and refers to the written statement itself, not merely approval of a general account of which the writing may be representative.

Again, if Congress meant less than this, there would have been no need of these two elaborate subsections. All that would have been required would have been a single phrase, "substantially accurate reproduction or recording of what the witness said." It could even have been left to the courts to supply the obvious, that in cases where the witness had in fact indicated his approval, this was evidence enough. We believe that Congress has imposed far [fol. 283] more definite safeguards.[9] See *United States* v.

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[9] We note the remarks of Representative Keating in asking for adoption of the final compromise bill,

> "The second question was, what shall be produced in court. The House bill had said, 'Written statements which were signed or adopted or approved by a witness.' The Senate had

Thomas, supra, at 194, as to subsection (1).[10] On subsection (2) our decision is in accord with *Borges* v. *United States*, D.C.Cir., 1959, 270 F.2d 332, *cert. den.* 361 U.S. 971, and *United States* v. *Stromberg*, 2 Cir., 1959, 268 F.2d 256, *cert. den.* 361 U.S. 863. See also the somewhat ambivalent decision of *Papworth* v. *United*

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added these words, 'Records of oral statements made by a witness to an agent of the Government,' thereby opening up the FBI files almost as wide as all outdoors. The Senate yielded on this issue also. The conferees provided that the only statements a defendant could see, and then only in the courtroom, were those actually signed or *formally approved* by the witness or a stenographic verbatim recital of a statement made by a witness which is recorded contemporaneously with the making of such oral statement." (ital. suppl.) 103 Cong. Rec. 16739 (Aug. 30, 1957).

We do not mean by our legislative references to say that there are none which might not be interpreted as having some other objectives. For example, one of the objections voiced to unapproved summaries was that they might contain the agent's personal additions. But, by the same token, we do not think that because such objection was vocalized, it was the only objective. At the expense of prolonging this footnote, we might give an example. Suppose that in a report which had not been specifically approved by the witness the agent wrote, "Witness cannot identify the robber." As soon as it appears that the report did not attempt to be substantially verbatim, the question must arise whether these words were the exact substance of what the witness said, or whether the witness made a number of partial observations which the agent felt did not add up to a satisfactory identification. If it was the latter, and, of course, the agent may no longer be available, or may have no memory at the time of trial, this would be highly unfair cross-examination of a witness who had made, and did recall what proved to be important features, even though in toto they did not amount to identification. We recite this to illustrate that it might readily be thought best to exclude all reports that had not been specifically approved, unless falling under subsection (2), rather than leave open in each instance the inquiry of what represented insertions, comments, or omissions by the agent.

[10] The court in *Campbell* did not define "otherwise adopted or approved," but it cited with apparent approval *United States* v. *Tomaiolo*, 2 Cir., 1960, 280 F.2d 411, 413, which held that a writing upon which the witness had endorsed and initialed twenty-two corrections, but had refused to sign, did not meet that standard. We cannot believe that the court intended to endorse so rigorous a view; nor do we.

States, 5 Cir., 1958, 256 F.2d 125, *cert. den.* 358 U.S. 854, which contains a dictum that notes of "the highlights of the conversation" are "substantially verbatim," but holds that "a running summary . . . in the language of the agent" is not.

We turn to the absence, over defendants' objection, of Staula at the hearing. This may have had some pertinence on the issues relating to the notes. It is clear on Staula's own testimony at the original trial that he never saw, and hence could not under our definition have approved, the investigative report as such. Similarly, with respect to the report, his testimony did not help defendants on the substantially verbatim issue. ("There are things in there turned around." 365 U.S. at 97—a seeming protest, were [fol. 284] it admissible, against the consequences of Toomey's rearrangement of his notes in chronological order.) However, the Supreme Court has indicated, without deciding, that if the notes themselves satisfied the requirement of the statute, the government may have to face some penalty for having destroyed them. The court did not wish to rule on this question on an empty record, and requested further facts.

Sufficient facts now adequately appear for us to decide that the notes were not substantially verbatim. On this issue Staula, the only other suggested witness, could not cast any further light. But although his testimony at the original trial was weak, on further examination he might have satisfied a trier of facts that he had read Toomey's notes and signed or otherwise approved them. The defendants had a right to pursue that matter at the hearing just as much as they had a right to cross-examine Toomey. They asked the court to summon Staula, but [fol. 285] the court replied that the Supreme Court had said this could not be done. This was a complete misunderstanding of the opinion. It was on an entirely different issue that the court had made such a ruling. At the same time the district court informed counsel that it would consider Staula's testimony already of record, an incomprehensible inconsistency on its part. Thereafter it disbelieved that testimony. Although it had a right to disbelieve it, the defendants had a corresponding right

to have Staula "live" and cross-examine him further. While in our view the issue might be of no legal consequence, we must remand the case for further hearing and findings, with Toomey and Staula both to testify, as to whether Staula signed or otherwise adopted or approved the notes, in order that the mandate of the Supreme Court be fully complied with. Because of the committed position of the present district judge on this question, that hearing should be before another judge.

While retaining jurisdiction of this appeal generally, an order will be entered returning the original papers to the District Court with direction to have further proceedings in accordance with this opinion and to return said original papers including the further proceedings when they shall have been determined.

[SEAL]

[fols. 286-288] • • •

[fol. 289] IN THE
UNITED STATES COURT OF APPEALS

• • • •

ORDER OF COURT
January 22, 1962

It is ordered that appellee file on or before February 23, 1962, printed copies of supplemental record appendix consisting of the further proceedings and opinion of the District Court pursuant to order of this Court of November 7, 1961; and

Leave is granted to appellee to file a supplemental brief in printed form on or before February 23, 1962, and leave is granted to appellants to file a supplemental brief in typewritten form on or before March 23, 1962; and

This case will be assigned for further argument at the April session, 1962, at which time the party or parties filing supplemental brief may be heard.

By the Court:

/s/ Roger A. Stinchfield,
Clerk.

[SEAL]

Thereafter, on March 2, 1962, the following Supplemental Record Appendix was filed by appellee:

[fol. 290]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALVIN R. CAMPBELL, ET AL., DEFENDANTS, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

SUPPLEMENTAL RECORD APPENDIX TO BRIEF FOR APPELLEE

[fol. 291] • • •

[fol. 292]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Title Omitted]

ORDER OF COURT REMANDING CASE—November 7, 1961

It is ordered that the original papers be returned to the District Court with direction to have further proceedings in accordance with the opinion passed down this day and to return said original papers including the further proceedings when they shall have been determined.

By the Court:

/s/ Roger A. Stinchfield
Clerk.

• • • •

[fol. 293]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 57-280 WYZANSKI, D.J.

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA

v.

ALVIN R. CAMPBELL ET AL

APPEARANCES:

William J. Koen, Esq., Asst. United States Attorney, for the Government.

Melvin S. Louison, Esq. and Lawrence F. O'Donnell, Esq. for the Defendants.

Court Room No. 6
Federal Building
Boston, Mass.
Wednesday, Nov. 29, 1961.

* * * *

[fol. 294-300] * * *

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[fol. 301]

DOMINIC STAULA, SWORN

Direct Examination by Mr. Louison

Q. Would you state your name and address please. A. Dominic Staula.

The Court: A little louder please.

The Witness: Dominic Staula.

A. (Continuing) 259 Highland Street, Stoughton, Mass.

Q. Mr. Staula, on the occasion of July 18, 1957, you were present at the Norfolk County Trust Company in Canton when there was a robbery there? A. Yes, sir.

Q. You will have to speak up, please, because you are some distance from the Court. You were present on that day, is that correct? A. Yes.

Q. And as a result of being there you subsequently had an interview with an FBI agent or agents? A. Yes.

Q. And was it one or more agents that you had conversation with? A. Well, I don't know if they were all Agents but there were—

The Court: I can't hear you and no one else can if you mumble, sir.

The Witness: I say, I don't know if they were all Agents, but there were a few fellows there.

Q. There was more than one man there at the time an interview was made with you? A. Yes.

Q. Do you remember with relation to July 18 when that interview was? A. I think it was the following day.

[fol. 302] Q. And do you know where it was? A. Yes. At the Police Headquarters.

Q. At the Canton Police Headquarters? A. Yes.

Q. Now, Mr. Staula, when did you receive a summons to appear here in Court today? A. Last Saturday.

Q. And did you have any knowledge prior to receiving the summons that you were going to be summonsed? A. No.

Q. I see. And upon receiving that summons did you call anyone in the Federal Building? A. No.

Q. Have you had any conversation with anyone from the FBI or the United States Attorney's office from Saturday until this moment? A. Just, I said, "Hello" outside. That's all.

Q. Well, did I see you having conversation with the Assistant United States Attorney in the corridor just a few minutes ago? A. Yes. I said hello to him.

Q. More than "hello"—didn't I see you talking together out there? A. Well, I was inquiring what it was all about, that's all.

Q. I see. Now did you call anyone between the time you received that summons and coming today to Court? A. No.

Q. Did you receive a call from anyone? A. No.

Q. And this did not arouse your curiosity as to why some four years later you are being summonsed into Court? A. Yes.

Q. And as a result of your curiosity being aroused, you did nothing? A. Well, I met a couple of the people that were in the case before and I asked them if they had been called or heard anything and they said No.

Q. And when they said No, did that puzzle you any more why you should be called and not anyone else? A. No.

Q. And that did not bother you? A. Well, I just thought I would find out today.

[fol. 303] Q. What time did you get to the Federal Building this morning? A. What time did I—?

Q. Yes. What time did you arrive here in this building? A. Oh, about quarter of nine.

Q. At quarter of nine. And you went to the 11th floor, the United States Attorney's office, is that so? A. No. I came right up here.

Q. You came up here at that time? A. Yes.

Q. Do you remember what floor you were on when you testified at the Grand Jury hearing when this case first started? A. No, I don't.'

Q. Well, did you go to that area, that floor where the Grand Jury was held today, at all? A. No.

Q. In other words, you want to leave it that at no time from Saturday until the time you came into court today did you go to the 11th floor, to the United States Attorney's office. A. No.

Q. Now did you ask Mr. Koen outside what you were here in Court for today? A. Yes, but he said he couldn't tell me anything.

Mr. Koen: What is that again?

The Witness: He said he couldn't tell me anything.

Q. So that you discussed this case with no one at all from 1958, when you testified in Court, until the present moment? A. Well, at different times I would meet—

Q. I mean anyone— A. —different witnesses.

Q. —from the police, the federal government or the United States Attorney's office? A. No.

Q. All right. Now you do recall in January of 1958 testifying here in Court, don't you? A. Yes.

Mr. Louison: If your Honor please, for the information of the Court and the government, I am referring to

a transcript of testimony taken at the original trial of this witness' testimony. Do you have it, Mr. Koen?

The Court: I will mark it for identification as Ex- [fol. 304] hibit 1 for Identification. Would you please give it to me, Mr. Duwan? This document has on the outside of it Trial before: McCarthy, J., United States v. Arnold Campbell et als, Boston, January 23, 1959. The cover page says there are within pages 1443 to 1579. I take it that I am asked to look at page 2 where the name Dominic Staula appears and Direct Examination by Mr. Koen follows.

Mr. Louison: Yes. Now I refer your Honor to a page further in the volume marked 61 in the upper right hand corner.

(Volume XIV, Pp. 1443-1579, Stenographic Record of Trial before McCarthy, J., United States v. Arnold Campbell et als, January 23, 1959, marked Exhibit 1 for Identification.)

Q. Now, Mr. Staula, at that time you were asked: "Q. And could you tell me when you first related the story regarding your experiences on July 18, 1957, at the Canton Bank?" And you answered: "A. It was at the Police Headquarters in Canton." A. Yes.

Q. And that is so, isn't it? A. Yes.

Q. "Q. And were any FBI Agents present?" And you answered: "Yes." A. Yes.

Q. And that is so? A. Yes.

Q. And you were asked then: "Q. And can you remember the names?" You answered: "No, I don't know his name." And that is correct at the present time? A. Yes.

Q. Have you learned his name since then? A. No.

Q. All right. Did you see him here in Court or in the corridor this morning? A. No. If I—

Q. You did not recognize the Agent who interviewed you? A. No. There was more than one there. Different ones were asking me questions.

Q. And you could not recognize any of their faces here [fol. 305] in Court this morning, could you? A. No. There were too many of them there at the time.

Q. "Q. One took the interview from you, was it?" And you answered: "No." And that was so? A. Yes.

Q. Please answer. A. Yes.

Q. "Q. Two of them? A. There were at least two. I didn't know them." A. Yes.

Q. That was your answer then. That is correct? A. Yes.

Mr. Louison: Now I refer your Honor to a page with the figure 91 up in the right hand corner.

Mr. Koen: Could you tell me what the over all—

The Court: 1540.

Mr. Koen: Thank you, sir.

Q. You do recall testifying in Court on that occasion? A. Yes.

Q. And you recall the testimony that you gave? And you remember the events as they happened? A. I believe so.

Q. Now you were asked the question: "Q. Now, Mr. Witness, when you said you had a conversation with the FBI sometime less than a week after July 18, 1957, did they write down what you had to say to them. The Court: If you know.

The Witness: Yes."

A. Yes.

Q. And that is so, they did write down what you said to them? A. Well, they took notes.

Q. Did they write down something while you were talking to them? A. Well, I really don't know what they were writing down.

Q. The question is whether or not they were writing something. A. Well, he had a pad in his hand. I don't notice whether he kept writing while I was talking or not.

Mr. Louison: I don't mean to press unduly, your Honor, but I believe the question has not been answered. May I continue?

[fol. 306] The Court: You may continue.

Q. Did the FBI Agent have a paper and pencil while he was talking to you? A. Yes.

Q. And was he writing something? A. I already said I didn't know whether he was writing while I was talking to him.

Q. You can't say whether he was writing at that time? A. No.

Q. Well, when you said earlier—"did they write down what you had to say to them?"—and you said "Yes," is that a correct answer? A. I took it for granted he was writing down what I said.

Mr. Koen: I didn't hear that.

The Court: We can't hear you.

The Witness: I said I took it for granted that he was writing what I said. I wasn't watching whether he was writing, so how can I say he was writing what I said?

Q. The fact of the matter is that he was writing? A. Yes.

Q. And the next question was—and would you please follow along with me—"Q And did they read it back to you, sir? A Yes." And that was so? A. Yes.

Q. "Q And did they ask you if that was essentially what you had just related to them? A Yes." And that was so? A. Yes.

Q. "Q And did you tell them yes? A. Yes." And that was so? A. Yes.

Q. Now how long did you remain in the presence of this FBI Agent, after you told him that Yes—excuse me, I want to quote exactly. After you told them that that was essentially what you had just related to them, how long more did you remain in the company of the FBI Agent at the police station? A. I didn't remain.

Q. You left immediately? A. Yes.

Q. Well, the sequence was, if you recall, that you first [fol. 307] told him a story, is that correct? A. Yes. I related what happened.

Q. And following that they asked you, or he or they asked you some questions. A. Relating to the robbery.

Q. Relating to the robbery. A. Yes.

Q. And you answered them? A. Yes.

Q. And he was writing while you gave him the answers to the questions? A. Yes.

Q. And when it was all over they took this paper they had been writing on and read it back to you? A. Yes.

Q. And then you said to them Yes, or at least in some manner you approved what they had written down as being the story you gave them?

Mr. Koen: I pray your Honor's judgment.

Mr. Louison: I press the question, your Honor.

The Court: Well, I am going to sustain the objection to the form of the question. I am not trying to prevent you from inquiring about the topic.

Q. Well, when you left there immediately after this interview was concluded you were satisfied, were you not, in your own mind, that what was read back to you was essentially what you had told them? A. Yes.

Q. And at that time you had related to them everything that you recalled happening in the bank the previous day? A. Yes.

Q. How many men read back this paper or these papers? Was it one or more? A. One read them back.

Q. One read them back. And you signified approval to him of what he read back, isn't that so?

Mr. Koen: I pray your Honor's judgment.

The Court: That form of question is objectionable. You may ask what, if anything, the witness said, but I do not want you to characterize it with a legal conclusion in the very words of the statute.

[fol. 308] Q. Well, in any event, you told them that that was essentially what you had just related to them?

Mr. Koen: I pray your Honor's judgment.

The Court: I see no reason for you not to ask him to say what he actually said rather than for you to summarize it when you were not there to know what he said.

Q. All right, sir. What, if anything, did you do or say after this FBI Agent read back to you what he had written down?

Mr. Koen: I am going to—

A. What did I do or say?

Mr. Koen: Wait a minute please.

The Court: Well, those are two questions.

Q. What, if anything, did you say to the Agent after he had finished reading back to you what he had written down on the paper?

Mr. Koen: I pray your Honor's judgment.

The Court: I will allow that.

Mr. Koen: May I be heard?

The Court: Yes.

Mr. Koen: The question—

Mr. Louison: Well, may I—

The Court: Wait a moment. He is objecting. I am going to hear Mr. Koen's objection.

Mr. Louison: May we be heard at the bench, your Honor?

Mr. Koen: I have a formal objection to the content of the question. The question embraces something which has not been the subject of testimony as yet. The question says: After he had read back what he had written down. There is no evidence that what he read back was what had been written on that piece of paper.

The Court: The objection is overruled. Please read the question again, Mr. Duffey.

(The following question is read: "Q What, if any-
[fol. 309] thing, did you say to the Agent after he had finished reading back to you what he had written down on the paper?")

A. Well, I told him that to the best of my knowledge that is what had happened.

Mr. Koen: I can't hear you, sir.

The Court: "I told him that to the best of my knowledge that was what had happened."

Q. And that was true? A. Yes.

Q. That is the prhase you used? A. Well, I don't recall now if that was exactly the phrase but—

Q. A moment ago— A. I told him that to the best of my knowledge it was true.

Q. What, if anything, did you do then after he read back the notes to you—excuse me—after he had read back what he had written down on the paper to you? A. I left.

Q. You left. So the last thing you had to do with the Agent was telling him in some sort of words that it was true? A. Correct.

Mr. Louison: I think that concludes our inquiry, if your Honor please.

The Court: Do you wish to ask any question, Mr. Koen?

XQ. Mr. Staula, do you know what was on that paper which you say the man was writing on, the FBI Agent? A. Do I know what was on the paper?

XQ. Yes. A. Just the notes of what I had told him.

XQ. Did you read them? A. I can't recall.

The Court: I can't hear you.

The Witness: I can't recall.

XQ. As a matter of fact, was he sitting across the table from you? A. I believe he was.

XQ. And he remained in the position after he had completed writing on the pad of paper? A. Yes.

[fol. 310] XQ. And he never gave you the pad of paper to read from, did he? A. No.

XQ. And it is so, isn't it, sir, that as to what was written on the paper you had no knowledge then? A. No.

XQ. You have no knowledge now? A. No.

XQ. So that when you told counsel that he read back what was on the paper, you didn't know what was on the paper at that time, did you?

Mr. Louison: I object, your Honor.

The Court: I will allow the question. I am fully aware, no one could be better aware than a Judge, that someone at a distance may not know what is actually the mark upon a piece of paper and yet he may have a sound basis for inferring what is a mark upon a piece of paper. If he sees a person who has a notebook in front of him making notes, then looking down at the notes, then opening his mouth, he may reasonably conclude that the opening of the mouth has some relationship to the markings on the paper. (A pause.) I think there is an unanswered question. Mr. Duffey, read the question.

(The following question is read:

Q. So that when you told counsel that he read back what was on the paper, you didn't know what was on the paper at that time, did you?")

A. No.

XQ. When I am talking about the piece of paper, I am talking about the notes which the FBI Agent made, right, or you think he made? A. Yes.

XQ. And that, Mr. Staula, was the point at which the Agent asked you if that was essentially what you had just related to him? A. Right.

Mr. Koen: I have no further questions.

The Court: Is there anything else? Mr. Louison?

Mr. Louison: One moment please, your Honor. (A pause.) I think that is all, if your Honor please.

[fol. 311] The Court: You are excused. Mr. Staula, as far as I know, no one wants you any further in connection with this hearing. And you may go or, if you please, you may remain as a spectator.

Mr. O'DDonnell: The defense now calls Agent Toomey.

JOHN F. TOOMEY, JR., SWORN

Direct Examination by Mr. O'Donnell

Q. What is your name? A. John F. Toomey, Jr.

Q. And your business or occupation? A. Special Agent, Federal Bureau of Investigation.

Q. And how long have you been so employed? A. Since July 14, 1941.

Q. And you recall July of 1957? A. I do.

Q. And you were engaged in your duties as an FBI Agent then? A. I was.

Q. On or about July 18, 1957, it is so, isn't it, Mr. Toomey, that you were investigating a bank robbery? A. I was.

Q. And that was the crime associated with the Norfolk County Trust in Canton? A. It was.

Q. And at that time you were or had about 16 years in the Service? A. Yes, sir.

Q. Now, Mr. Toomey, it is so, isn't it, that you knew what your job was on that day, that you were to investigate eye witnesses to a bank robbery? A. I was to interview them, sir.

Q. Yes. And among the witnesses interviewed by you on that day, not on July 17, but on July 18, do you recall one Dominic Staula? A. I believe I interviewed him on the 19th.

Q. Do you recall Dominic Staula? A. Yes, sir.

Q. And on the 19th that interview took place in the Canton police station? A. Yes, sir.

Q. About Noon time? A. Yes, sir.

[fol. 312] Q. And you identified yourself to Dominic Staula when you came into contact with him? A. Yes, sir.

Q. You had some credentials that you displayed to him that indicated you were a Special Agent of the FBI? A. Yes, sir.

Q. Now as a result of talking with Dominic Staula—you did talk to him, didn't you? A. Yes, sir.

Q. You knew he was an eye witness to a bank robbery; that is so, isn't it? A. Yes, sir.

Q. And it was your purpose as an investigator with many years' experience to find out from Dominic Staula what he observed on the premises of the bank on the previous day; that is so, isn't it?

Mr. Koen: I pray your Honor's judgment.

The Court: What is the objection?

Mr. Koen: Well, I would suppose that if it is preliminary to the specific question that was sent back to the Court of Appeals, I would have no objection, but if it is going into the history of how, why and when interviews are taken, I think it is going to serve no purpose except to prolong the hearing.

The Court: I am sure Mr. Koen's cautionary words will be in your mind, and you will limit your examination in accordance with the suggestion.

Mr. O'Donnell: Yes, your Honor.

Q. Now that was your purpose, wasn't it, Mr. Toomey, to get what he observed in the bank on that day? A. Yes, sir.

Q. And the most vital observation he made in your mind was as to who committed the crime; that is so, isn't it, Mr. Toomey? A. Yes, sir.

Q. And in making that investigation you had an interview with Dominic Staula as to who he observed in the bank committing the crime, didn't you, sir? A. Yes, sir.

Q. And isn't it so, sir, that he told you that he only [fol. 313] observed two people in that bank? That is so, isn't it, sir? A. Yes, sir.

Q. And that he also told you that he never saw a third robber in the bank; that is so, isn't it, sir? A. Yes, sir.

Q. And, as a matter of fact, you wrote that down, didn't you, sir? A. Yes, sir.

Q. As a matter of fact, sir, you also wrote down about 500 words during that interview, didn't you, sir? A. I don't know the exact number, sir.

Q. And it is also true that as a result of that interview you wrote down what he told you, didn't you, sir? A. Not every—

Q. The question is you wrote down—

The Court: Well, just a moment. Allow him to answer please. I didn't hear the answer because you interrupted.

A. I didn't write down everything that Mr. Staula told me.

Q. No. But insofar as your notes you made concerning this crime, it is so, isn't it, sir, that you did write down as to observation of people committing the crime? A. Yes, sir.

Q. Now you recall, don't you, sir, testifying this year about this same matter on or about April 14, 1961, in this Court House Building? A. I don't recall the exact date, sir, but I do recall testifying concerning this matter.

Q. And with your experience, you recall that a court reporter was present taking down your testimony; that is so, isn't it sir? A. It is.

Mr. O'Donnell: Now for the Court and Mr. Koen, I am referring to a transcript of the testimony No. 5847 taken on or about April 14, 1961, Record Page 19.

The Court: That will be Exhibit 2 for Identification. More strictly speaking, I assume that the document is a hearing in the United States District Court for the District of Massachusetts before Judge McCarthy. Isn't that right?

[fol. 314] Mr. O'Donnell: Yes, your Honor.

Mr. Koen: It is March 14, 1961 on my transcript, sir.

The Court: Do you mean March or do you mean April?

Mr. O'Donnell: According to our Thermofax copy, we went on forma pauperis, it is March.

Mr. Louison: March is correct, sir.

Mr. O'Donnell: Yes, March is correct.

The Court: All right. You ask that all the references you made be changed to March from April?

Mr. O'Donnell: I do, your Honor.

The Court: All right.

(Volume I, Pp 1-126, of Stenographic Record of *United States of America* v. *Alvin Campbell, Arnold Campbell and Donald Lester, before McCarthy, D.J.*, March 14, 1961, marked Exhibit 2 for Identification.)

The Court: May I now have the Exhibit for Identification? It appears that it is March 14, 1961 before Judge McCarthy in the matter of United States of America against Alvin Campbell, Arnold Campbell and Donald Lester, and the number in this Court is Criminal 57-280-M. You gave the number in the Court of Appeals when you referred to the number 5847.

Mr. O'Donnell: Thank you, your Honor.

The Court: You are now asking me to look at page 19 of the document Exhibit 2 for Identification.

Mr. O'Donnell: Yes, your Honor.

Q. Now, Mr. Toomey, I show the transcript to you, 57-280-M, on page 19, and I ask you to look at it and read to yourself the questions and answers that you see on page 19. (A long pause.) Now isn't it so, Mr. Toomey—

The Court: From where I am sitting it looks as though the witness is looking at only page 19. Is it your intention to have him turn the page and look at page 20?

Mr. O'Donnell: Yes, your Honor. Thank you.

Q. (A pause) Now, isn't it so, Mr. Toomey, that on [fol. 315] March 14, I asked you the following question: "Q. What method did you employ at that time in the police station insofar as double checking your notes with Mr. Staula? A. After Mr. Staula told me of what he had seen in the bank, and I took notes during the period of time that he was reciting his experiences, I then asked him several questions. He answered these questions and I took notes concerning his replies to my inquiries. After that it was complete and I then went over the entire

story again with Mr. Staula, refreshing my memory with the notes I had taken to be certain that the story was accurate." That answer is so, isn't it, Mr. Toomey? A. That is correct, sir.

Q. "Q. And to be certain that the story was accurate, and you were looking at your notes when you did this? A. I was." That is so, isn't it, Mr. Toomey? A. Yes, sir.

Q. "Q. And it was your purpose, sir, to be certain also that your notes were accurate? A. That is correct." That is so, isn't it, Mr. Toomey? A. Yes, sir.

Q. "Q. And as a result of your interview with Dominic Staula and going over it again, you were satisfied as an investigator that your notes were accurate? A. That is correct." "Q. Now, it is so, isn't it, Mr. Toomey, that in employing that method of reviewing what Mr. Staula had told you, that you wanted to be certain, as you have told us, that your notes were accurate, right? A. Right." That is so, isn't it, Mr. Toomey? Yes, sir.

Q. Now, Mr. Toomey, would you please tell this Court what technique you employed at that moment with Mr. Staula to show your notes were accurate? A. After Mr. Staula recited the happenings of the day before, and I took notes concerning what he had said, I asked him several questions and took notes concerning his answers to those questions. I then went over the entire story with Mr. Staula in narrative form, referring to my notes, and when I finished asked him if the story was correct. [fol. 316] Q. And what did Mr. Staula say to you? A. He agreed that the story was correct.

Q. What words did he use in agreeing the story was correct? A. I can't recall the exact words, sir, but I don't recall him voicing any objection.

The Court: Frankly, I am not clear about what you mean, Mr. Toomey, when you say you "went over in narrative form." Will you give an illustration of exactly what you did so that I can understand what you mean by the words "went over in narrative form"?

The Witness: Yes, your Honor. Referring to my notes, which I had before me, which I had just taken, I said to Mr. Staula, "Now you arrived at the bank at approximately 10.15"—I don't recall the exact time, sir—

"and you parked your truck adjacent to the bank beside the depot, and then you came in, and you didn't observe anything as you entered the bank that was unusual, and you went up to the Teller's window which was served by Mr. Kennedy, and then"—may I refer to the interview?

The Court: What have you in front of you just so the record may show what you have? You don't have to do any more than tell me what it is.

The Witness: This is the Interview Report concerning the information that Dominic Staula told me, the Interview Report which I prepared as a result of the interview which I had with him.

The Court: Well, if I understand you correctly, this is not a document which you actually had when Mr. Staula was in front of you?

The Witness: No, your Honor.

The Court: All right. I will merely mark this Exhibit 3 for Identification at this point.

(Federal Bureau of Investigation Interview Report, Interview with Dominic Staula, marked Exhibit 3 for Identification.)

[fol. 317] The Court: Now continue with your illustration or your explication of what you meant by the phrase "went over in narrative form."

The Witness: In my notes there was a direct quote from Mr. Kennedy—from Mr. Staula "Over against the wall". And I said, "In other words, this man said to you, 'Over against the wall', and then you looked around and saw a man described as follows"—and I had the description in my notes, and I furnished the description as he had just furnished it to me to see that it was accurate.

Then in recounting his story to me originally, he had given a phyisical description of a man whom he said he observed standing in the middle of the bank, and I said, "Going over this description again: the sex is male, the race is Negro. You say his age is approximately 30 years, his height is five feet ten inches" and continued through the remainder of the description that he had furnished to me.

He told me that he did not observe a third man standing in the bank.

> "As far as the guns are concerned, you are not certain what type of guns they are but you feel they are 45 calibre automatics."
>
> 'As far as the man is concerned who wore the blue suit, you took a look at him and then turned around as ordered. You stood with your face to the wall for probably ten minutes and then you were told to walk into the vault. You don't recall which one of the men ordered you to go into the vault. And after you got in there you saw these individuals. You didn't see these individuals again. And then somebody closed the door of the vault and said something to the effect that the people in there should not leave for five or ten minutes. And then the vault door was opened by Sergeant Ruane of the Canton, Mass. Police Department.'

[fol. 318] The Court: For the benefit of the Court of Appeals, I would like to record what I just observed as you testified in this illustration which you gave in response to my suggestion. Each time you looked down at a piece of paper before you spoke a sentence, then you faced me and spoke a sentence, and again you looked at your Exhibit 3 for Identification and again spoke. Thus you constantly lowered your eyes to look at a document and then faced me and spoke.

Have I correctly described what you thought you were doing at that moment?

The Witness: Yes, your Honor.

Q. Now, Mr. Toomey, when you say "your notes", you mean your writing, right? A. Yes.

Q. Containing information furnished you by Dominic Staula? A. Yes.

Q. Now when you finished your writing, your notes, with the information furnished to you by Dominic Staula, you then asked him whether or not your notes with his information was accurate; that is so, isn't it? A. Yes, sir.

Q. Please tell the Court what he said to you. A. I can't recall specifically what he said, but I do recall that he didn't voice any objection that there was any inaccuracy contained therein.

Q. Mr. Toomey, you have told us about the interview with Dominic Staula that—it is so, isn't it, that he only observed two people in the bank, and he gave you a description of one; that is so, isn't it? A. He gave me a description of one and—

Q. And, sir—

Mr. Koen: Wait a minute please.

The Court: Please allow him to finish the answer. Please continue, Mr. Toomey.

A. (Continuing) —and he also gave me a description of the—of another man, described his clothing, I should say.

[fol. 319] Q. All right. He, on the day after this bank robbery, told you he had only observed two people in the bank; that is so, isn't it? He never observed a third robber, right? A. That is what he told me, sir.

Q. Now, sir, did you know that at the trial of this case Dominic Staula identified three people as being in that bank? Did you know that, sir?

Mr. Koen: I pray your Honor's judgment.

The Court: I don't see why that is pertinent. We all know what the Court of Appeals and the Supreme Court of the United States have said and we all know what the record disclosed. But why is it important to ask Mr. Toomey this question?

Mr. O'Donnell: May it please the Court, I was then going to ask the witness what, if anything, he did with the information he received on July 18th, in order to rebut, in order to furnish the truth to the Court that his organization, which is interested in innocence and guilt, he was in possession of this vital information, I want to know what he did with it to clear up what could be a great legal cruelty.

The Court: All that I can say is that it seems to me that this is the theme of your earlier argument in the Appellate Court but is in no way related to the issue which I am to try.

Mr. O'Donnell: All right, your Honor. That is all, your Honor.

The Court: Mr. Koen, do you wish to ask any questions of Mr. Toomey?

Mr. Koen: Yes, sir.

Cross Examination by Mr. Koen

XQ. Mr. Toomey, in connection with the discussion you had with Mr. Staula at the Canton Police Station, how long did the conference take, sir? A. Approximately a half-hour to the best of my recollection.

[fol. 320] XQ. The notes which you made, you had a pad on which you placed them, sir? A. Yes, sir.

XQ. And can you tell us how many pages of that pad your notes covered, sir? A. As well as I recall, sir, approximately a page and a half.

XQ. And we are now talking about a pad, sir, that is what, 8 by 6 or thereabout? A. A standard size white pad with blue lines contained thereon.

XQ. And, sir, the notes which you made were for the purpose of indicating to you in some form what the witness had said to you, is that correct? A. Yes, sir.

XQ. And when you were asked the question, "Were the notes read back to him?", sir, did you read the notes as such or did you implement them with what your memory was that the witness had said?

Mr. O'Donnell: Objection, your Honor.

The Court: I am going to sustain the objection. I would certainly allow you to have him illustrate what he did. And you can put to him different hypotheses and ask him whether these correctly or do not correctly reveal his method.

Mr. Koen: All right, sir.

XQ. When the witness Staula or the man named Staula told you the—a story on that morning, sir, when you made your notes, did you put down on paper everything which he said as he said it, sir?

Mr. Louison: I object, if your Honor please.

A. No, sir.

The Court: That is a perfectly proper question.

Mr. Louison: May I state the grounds of the objection, your Honor?

The Court: Yes.

Mr. Louison: As I understand it this hearing is limited now to the question of the approval of notes under Section E(1) and not to any question of "substantially [fol. 321] verbatim", as I understand the mandate of the Court of Appeals. I should like to carefully distinguish between the two situations, if I may.

The Court: I realize there is some force in the suggestion, but I allow the question. Please read the question, Mr. Duffey.

(The following question is read:

"Q. When the witness Staula or the man named Staula told you the—a story on that morning, sir, when you made your notes, did you put down on paper everything which he said as he said it, sir?"

A. No. sir.

XQ. So that, Mr. Toomey, you did not write down at that time what Mr. Staula told you? A. Not verbatim, sir.

(Mr. O'Donnell rises.)

The Court: Well, I'm afraid that the objection is well taken because I think that there is a little confusion here. Perhaps I did not understand you correctly, Mr. Toomey, when you were testifying in response to the examination by Mr. O'Donnell.

However, I have the impression that at one stage you said something like this, "Over against the wall." Is it not correct that on this white pad of paper you did record some of the actual words which you understood Staula to use?

The Witness: Those are the only words, your Honor, "Over against the wall." I quoted him directly on that particular phrase.

The Court: Are those the only words on the whole white pad of paper which purported to be verbatim?

The Witness: Yes, your Honor. (A pause.) Well, no, your Honor. For instance, his name and address certainly would have been verbatim and the physical de-

scription which he furnished of one of the men would have been verbatim.

[fol. 322] The Court: In your manuscript, the white pad, did you use quotation marks in your writing?

The Witness: With respect to that phrase, "Over against the wall," I did, sir.

The Court: Did you use any other quotation marks on the white pad?

The Witness: No, your Honor.

The Court: When you read or spoke to Staula, after he had finished answering your questions, did you as nearly as you could look at the exact words which you had written on the white pad and incorporate them in the remarks or narrative form of your statement to Staula?

The Witness: Yes, your Honor.

XQ. Well, in view of that, sir, may I ask you, were the notes made in long hand? A. Yes, sir.

XQ. And having in mind your ability to write quickly or not write quickly, was it possible for you to get everything which Staula said down on that piece of paper? A. No, sir.

XQ. And you didn't get everything down which he said, sir, is that correct? A. That is correct, sir.

XQ. And, therefore, it was your method that day to take down only certain phrases, is that correct? A. That is correct, sir.

XQ. And did you use certain abbreviations? A. I did, sir.

XQ. Now, sir, if the note had been given to somebody on that day other than yourself, from a reading of those notes could a person reading those notes have constructed the story as Mr. Staula gave it to you on that day?

Mr. O'Donnell: Objection.

The Court: That particular question is objectionable.

XQ. Having in mind the notes which you made on that pad on that day, sir, they meant something to you, sir, is that correct? A. That is correct, sir.

XQ. And having in mind the manner in which they [fol. 323] were written, if they were presented to anybody else would they have been able to decipher the notes and deduce from that a story which Mr. Staula had told you that day?

Mr. O'Donnell: I object.

The Court: I overrule that objection. That is a different question than the one where I sustained the objection.

Mr. Koen: Will you read the question back, Mr. Duffey, please.

(The following question is read:

"Q. And having in mind the manner in which they were written, if they were presented to anybody else would they have been able to decipher the notes and deduce from that a story which Mr. Staula had told you that day?")

The Court: Well, now, that isn't the question. Was it? I'm sorry. I think it is quite clear that no one has suggested that what was actually on that piece of paper conforms with all that Staula told Toomey and I, therefore, cannot allow a question which is based on an entirely false premise. But, unless I am mistaken, Mr. Koen, the question you were trying to put, and might legitimately put, would run something like this: would a properly instructed expert third-person render from your notes the same words that you render from your notes exactly as one stenographer trained in Gregg shorthand would be able to read the notes of another stenographer trained in Gregg shorthand.

The Witness: I don't quite understand the question.

The Court: Well, if two stenographers each know Gregg shorthand, and their names are A and B, A is in Court and takes the notes, A dies and B looks at the shorthand book and knows enough of the system to be able nonetheless to type out the notes, and a Court would receive the typewriting of B from the notes of A because B knows enough of A's method to be able to reliably type [fol. 324] from the notes of A. The question which is being put to you is whether your notes had a character which would enable a second person to type from those notes substantially the same thing you would type from those notes.

The Witness: Only, sir, if the person had the same knowledge of the case that I had had.

The Court: Well, assuming that he did have.

The Witness: I would say Yes, sir.

The Court: So that another person, if he were with you in the room when Staula spoke would be able to make the same transcription that you made?

The Witness: Yes, sir.

XQ. Were you alone during the interview with Mr. Staula? A. I was.

XQ. Was there ever any other Agent in the room with you during that conference, sir? A. There was not.

XQ. And all the handwriting on that pad of paper was your handwriting, is that correct, sir? A. It was, sir.

XQ. Now, sir—

The Court: I think there is still a gap, Mr. Koen, that perhaps ought to be filled in. Was there anyone else who had roughly the same amount of knowledge you had of the case in general?

The Witness: Yes, your Honor.

The Court: And using the letter X to identify such a person, would X have been able from your pad to have formulated about the same story word for word that you formulated from that pad?

The Witness: Yes, sir, your Honor.

XQ. If he had the same knowledge.— A. If he had the same knowledge of the case.

XQ. —of the case. A. Yes.

XQ. And without the knowledge of the interview with Mr. Staula would he have been able to produce the same results?

[fol. 325] Mr. Louison: Objection to that question, your Honor.

The Court: I will allow it.

A. I don't believe he would have been able to produce it had he not sat in on the interview with Dominic Staula.

XQ. And, sir, is that because of the manner in which you took the notes or made the notes rather? A. Yes, sir.

XQ. And you adopted certain—that is you made note as to one quote. A. Yes.

XQ. You used abbreviations? A. Yes, sir.

XQ. In the course of longhand making of the notes you

perhaps used a phrase here and there which called your attention to something which Mr. Staula said, correct? A. Yes, sir.

XQ. So unless somebody were there and knew what he said and knew the significance of those notations, he could not produce a report covering the interview in the same manner that you did, is that correct? A. That is correct.

XQ. Now, sir, at no time while you were in the Canton Police Station on that day did you show Mr. Staula the notes which you had made, correct? A. No, sir.

XQ. At no time on that day did you ask Mr. Staula to initial or sign anything, is that correct? A. I did not ask him to initial or sign.

XQ. At no time on that day, sir, did you ask Mr. Staula to put anything in writing, is that correct? A. That is correct, sir.

XQ. Did he on that day put anything in writing at your request? A. Not from me, sir.

XQ. Did he put anything in writing which was delivered to you, sir? A. No, sir.

The Court: Gentlemen, will you remind me of what I am quite sure is the case. The original white pad is lost or non-existent?

Mr. Koen: Yes, sir. I presume, sir, that this is directed only to that white pad, this hearing, as I understand it. [fol. 326] The Court: Well, certainly that is a critical point. Whether the word "only" ought to be there, I am not so sure.

Mr. Koen: Document-wise, sir.

XQ. Now, sir, after you had made these notes, which consisted of the abbreviations, and the phrases, from what the notes meant to you you then in your own mind on that day set them up more or less in chronological order, is that correct? A. That is correct.

XQ. And then you recited back to Mr. Staula your memory of what he said as it was refreshed by those notes? A. Yes, sir.

XQ. And I think you said that after you finished relating what you gathered from the notes and his talk with you, that you don't remember that he said anything, correct? A. That is correct.

Mr. Koen: I think that is all.

Q. Now, of course, Mr. Toomey, with all your experience, investigating this bank robbery, it is so, isn't it, that the most vital part of the entire interview was the question whether or not your notes meant to Mr. Staula the same thing as they meant to you; that is so, isn't it?

Mr. Koen: I pray your Honor's judgment.

The Court: Well, he may answer that question.

A. No.

Q. Now isn't it so, Mr. Toomey, that another vital part of your interview was whether or not the wellspring of all your knowledge regarding Dominic Staula was correct? A. Yes.

Q. As a matter of fact, after you had read back, it is so, isn't it, sir, that the most vital part of your entire effort taking notes, reading them back, was the question [fol. 327] whether or not Dominic Staula agreed with them? A. I didn't read the notes back to him, sir.

Q. Well, the question is, as a result of your interview, the most vital part of your interview wherein you took notes is the question whether or not Dominic Staula agreed with the information he furnished to you?

Mr. Koen: I pray your Honor's judgment.

The Court: I will let him answer that question.

Mr. Koen: All right. I still object.

The Court: I understand.

The Witness: May I have the question again, please, sir?

The Court: Mr. Duffey—

Mr. O'Donnell: I will withdraw the question, sir.

The Court: All right.

Q. Mr. Toomey, isn't it so that the practice you followed on January 18, 1957 was to go back to your office in Brockton, which you did, and take the notes containing the information furnished by Dominic Staula and transcribe them onto a disc; isn't that so, sir? A. No, sir.

Mr. Koen: Wait a minute please. I pray your Honor's judgment.

The Court: Well, he may answer the question. He answered No.

Mr. Koen: Well, my objection was—

The Court: Well, you can't object to a question which gets a negative answer.

Mr. Koen: Except that it might open up something else which might be no part of this hearing. That was the basis of my objection, Judge.

Q. Whether or not, Mr. Toomey, you transcribed the notes that you took that day?

Mr. Koen: I pray your Honor's judgment.

The Court: You may answer the question. Did you transcribe the notes?

The Witness: No, sir.

[fol. 328] Q. Did you dictate from the notes? A. I dictated from the notes.

Q. And isn't it so that you dictated onto a disc? A. That is correct.

Mr. Koen: Wait a minute please.

The Court: Yes. You may answer that. You did?

The Witness: Yes, your Honor.

Q. And the disc was transcribed by a third-party? A. Yes, sir.

Q. And that transcription typed up was sent back to you? A. Yes, sir.

Q. For approval? A. Yes, sir.

Q. And you took now this typed report by a third-party, sent back to you, and compared it with your notes to see if the transcription was accurate? You did that, didn't you, Mr. Toomey?

Mr. Koen: Wait a minute. My objection.

The Court: You may answer.

A. Would you repeat that please?

The Court: Read it please, Mr. Duffey, because I have overruled the objection.

(The following question is read:

"Q. And you took now this typed report by a third-party sent back to you and compared it with your notes to see if the transcription was accurate? You did that, didn't you; Mr. Toomey?")

A. Yes, sir.

Q. And, sir, it is so, isn't it, that after you were satisfied that it was an accurate transcription typed up by a third-party you then destroyed your notes? A. Yes.

Q. And, as a matter of fact, sir, the very papers that you took out of your inside pocket today, when you asked the Court to permit you to refer to them, is in fact an accurate copy of the transcription that you okayed? That is so, isn't it, sir? A. Yes, sir.

[fol. 329] Mr. O'Donnell: I offer it, may it please the Court.

The Court: I will receive Exhibit 3 for Identification as Exhibit 3.

(Document formerly marked Exhibit 3 for Identification received in evidence.)

Q. Now in the transcribed document that is now captioned FEDERAL BUREAU OF INVESTIGATION INTERVIEW REPORT, in setting up identification did you use an abbreviation for the word "height"? A. I believe I did, sir.

Q. Did you use an abbreviation for the word "weight"? A. I believe I did.

Q. In the final transcribed report that you okayed, however, the word "Height" was written out? A. Yes, sir.

Q. And the word "Weight" was written out? A. Yes, sir.

Q. And, as a matter of fact, throughout that report, when you said that you used quotes on "Over against the wall," you also used quotes on "Mr. Staula stated"—quotes were used when it was something that Mr. Staula stated. Does that help your memory? A. When I reported in there the exact words he used, I set them off by quotes.

Q. And so it is so, isn't it, in the final document you do not have any abbreviations or catch-phrases, do you? A. There are no abbreviations. What do you mean by "catch-phrases"?

Q. There are no abbreviations, you say? A. May I refresh my memory with it again?

Q. Well, what does your memory tell you now, if you have any? A. "Mass." would be abbreviated instead of Massachusetts.

Q. "Mass." would be abbreviated, meaning the State of Massachusetts? A. Yes, sir.

Mr. Koen: "could be abbreviated."

The Court: As a matter of fact, that does not appear [fol. 330] to have been abbreviated, but "A.M." and "Mr." for Mister appear as abbreviations.

Is that all, Mr. O'Donnell?

Mr. O'Donnell: That is all, your Honor.

The Court: Is there anything else that you want to ask, Mr. Koen?

Mr. Koen: I think there was one question, your Honor, and I don't know whether it was answered or not. I would like to call the Court's attention to the fact that outside of the phrase "Over against the wall", those are the only quotation marks that appear on Exhibit 3 despite counsel's question that "Mr. Staula said."

The Court: All right.

Mr. O'Donnell: May it please the Court, in deference to the remark of my Brother, I referred to the quotes because in the Opinion by the United States Supreme Court in reproducing the interview report they used sub-quotes and prime quotes.

The Court: Well, whatever the Supreme Court of the United States may have said, the Supreme Court of the United States is responsible for.

Recross Examination by Mr. Koen

XQ. Just one or two questions, Mr. Toomey. What you said to Mr. Staula on that morning differed somewhat from the notes which you had in front of you, didn't it?

Mr. O'Donnell: Objection.

The Court: You may answer that.

A. Yes, sir.

XQ. And what you recited or related back to Mr. Staula on that morning was your understanding of Mr. Staula's account of the activities of the previous day?

Mr. O'Donnell: Objection.

The Court: Sustained. I will allow him to tell what it was. I won't allow you to lead your own witness for [fol. 331] clearly there couldn't be a clearer case of somebody being your own witness than an FBI Agent

acting on questions put by an Assistant United States Attorney.

Mr. Koen: Well, I will take your Honor's ruling on it. With all due respect, I do not entirely agree, but that is the ruling and that is it.

XQ. In any event, what you told Staula that morning after you made the notes, is it a fact it differed to some extent as to what was in your notes?

Mr. O'Donnell: Objection.

The Court: You may answer that. Did it differ?

The Witness: Yes, it differed.

XQ. And also what you told Mr. Staula on that morning, did that differ from what went into the Interview Report, which is now Exhibit No. 3 to some extent?

Mr. O'Donnell: Objection.

The Court: You may answer that.

A. Yes, it differed.

Mr. Koen: That is all.

Further Redirect Examination by Mr. O'Donnell

Q. Mr. Toomey, it is so, isn't it, that the information you used came from Mr. Dominic Staula? A. Yes, sir, and from my own knowledge of the robbery.

Q. Oh. You weren't—not to be facetious—but you weren't at the bank during the robbery? A. No.

Q. So your knowledge of the robbery is that which was furnished by people that had personal observation, right? A. Yes, sir.

Q. And during the interview with Dominic Staula it was his observations you were interested in? A. Yes, sir.

Q. And you had no motive for making a bad report, did you?

Mr. Koen: I pray your Honor's judgment.

The Court: Well, I will allow the answer.

[fol. 332] A. No, sir.

Q. Now, as a matter of fact, you got his observations, while on the premises of the Canton bank during a crime of robbery, didn't you?

Mr. Koen: I pray your Honor's judgment. Haven't we gone into this before?

The Court: I think this has been sufficiently covered.

Q. It is so, isn't it, that you didn't change any observations Mr. Staula had given to you? A. No, sir.

Q. Will you speak up? Your answer is—? A. No, sir.

Q. So it is so, sir, isn't it, that the difference was that you put it in a narrative form from the notes? A. Yes, sir.

The Court: I take it that counsel are through?

Mr. Koen: Yes, sir.

Mr. O'Donnell: Yes, sir.

Mr. Louison: Yes, sir.

The Court: I want you to address your mind to one question. When you spoke to the disc you had in front of you a white pad. If by mischance that disc had been lost half an hour afterwards and you spoke into a second disc from that white pad is it your opinion that the recordings on the two discs would be substantially the same?

Witness: It is, your Honor.

The Court: Thank you. All right. You are excused. You can stay here if you want to.

Gentlemen, do you wish to argue, any of the three of you?

Mr. Koen: I don't care to argue, sir. I think it is a very narrow question. Your Honor has heard the evidence. That's it.

Mr. O'Donnell: No argument.

Mr. Louison: Waive argument, your Honor.

The Court: Mr. Duffey, I am going to request you as soon as convenient to type out this. I will render a written Opinion, in view of the fact that the Court of Appeals [fol. 333] obviously contemplates a written Opinion, and presumably there is a chance that it might even go back to the Supreme Court of the United States.

Mr. Louison: Your Honor and Mr. Koen—

The Court: I think it would be desirable under all the circumstances to return the prisoners to the place of custody because no matter what I decided I would have no authority to take any action regarding them. The Court of Appeals has merely asked me to make a finding so that they may enter an appropriate Order. Isn't that correct?

Mr. Koen: That is my understanding, sir.

Mr. Louison: I was going to ask, if your Honor please, if I might have a day's leeway to prepare some motions in anticipation of a new appeal to the United States Supreme Court requiring their own signatures. I hope I don't need them.

The Court: Whose signatures?

Mr. Louison: The defendants.

The Court: For what purpose?

Mr. Louison: Forma pauperis petitions, if your Honor please.

The Court: I don't think it takes any time at all to get their signatures on a document, if you need the signatures in connection with an application in forma pauperis today. It is only just 12 Noon. I instruct the Marshal and his Deputies to keep the prisoners here at least until 4 o'clock. Is that convenient for the Marshal?

Mr. Collins: Yes, sir.

The Court: Have you made arrangements for any particular hour for transportation?

Mr. Collins: No, sir.

The Court: All right. The prisoners are to be kept here until 4 o'clock, after which they are to be returned. They have fulfilled their function here. Whatever I decide, I have no power either to liberate them or to continue [fol. 334] their imprisonment. The matter rests with the Court of Appeals.

(Whereupon the hearing concluded.)

OPINION—December 5, 1961

WYZANSKI, D. J.

This case is in this Court pursuant to an order of the Court of Appeals, following its opinion rendered November 7, 1961 in *Alvin R. Campbell et al* v. *United States*, No. 5847. By lot, Judge Caffrey drew the case. He disqualified himself and, at his request, last week I accepted assignment of the case. November 28, 1961, I asked counsel to appear before me the next day. They did, and, with their consent, I scheduled the case for hearing on December 5, 1961, and for that day summoned Staula and Toomey "both to testify", as ordered at p. 13 of the opinion of the Court of Appeals. At their counsel's suggestion, I also issued process requiring the three defendants to be in Boston December 4, 1961 so that counsel might interview them that day, and have them present in the courtroom for identification purposes on December 5, 1961.

The story of this case requires only brief recapitulation. December 17, 1957 the grand jury indicted these three defendants for armed robbery of a bank under 18 U.S.C. § 2113. Judge McCarthy tried the case to a jury. Staula testified. To impeach him defendants' counsel sought access to a so-called interview report,—the document before me as Ex. 3. Judge McCarthy refused counsel access to that paper. The jury convicted. February 18, 1958 Judge McCarthy imposed sentences of 25 years imprisonment on each defendant. They appealed. The Court of Appeals affirmed. 269 F.(2d) 688 (1959). On certiorari, the Supreme Court, in effect, suspended the convictions and returned the case to the District Court for the purpose of [fol. 335] making a further inquiry into the circumstances attending the report. *Campbell* v. *United States*, 365 U.S. 85 (1961) Judge McCarthy held a hearing, and on May 1, 1961 he filed findings of fact and conclusions of law, and he re-imposed the sentence of 25 years originally imposed on February 18, 1958, but adjudged that defendants be credited will all good time already served by them under the original sentences. On appeal, the Court of Appeals re-examined the evidence, adopted canons for

the interpretation of the relevant Jencks statute, 18 U.S.C. § 3500, and, while retaining jurisdiction of the appeal generally, returned the original papers to this Court for further proceedings before another judge.

The hearing before me involved the testimony of only Staula and Toomey. Both were examined by defendant's counsel and by the assistant District Attorney. Each gave a straightforward and, in general, credible account. Such discrepancies as there were in no way reflected on the integrity or general testimonial reliability of either man. But there were some minor inaccuracies of observation and lapses of memory such as might be expected of honest men. My findings on the basis of their testimony follow.

1. On July 19, 1957 Toomey, an F.B.I. special agent, alone interviewed at the Canton police station Staula who, as a customer present in the bank, was an eyewitness of the robbery.

2. Toomey had in front of him an ordinary pad of white paper with blue lines. As he asked Staula questions, the pad was not within range of Staula's detailed observation. But from Toomey's own testimony, it is quite clear what he put on the pad. He did not purport, as though he were a court stenographer, to write down every word. But in longhand, and not in cipher, or with unusual abbreviations, he set down two different types of information. One was direct quotation of the precise words Staula [fol. 336] used in describing each of the alleged robbers whom Staula observed, and of the phrase "over against the wall" used by Staula. The other information was a substantially accurate, but not letter-perfect, rendering of answers Staula gave to Toomey's questions.

3. When Toomey had finished writing, he addressed Staula. Toomey did not purport to read the jottings on the pad in just the order they appeared, nor with the scrupulous care that one stenographer would read back to another. Yet Toomey not merely adhered to the substance but so far as practical to the precise words,—and to achieve this correspondence he looked down at the jottings each time before be uttered a sentence.

4. At the end of the reading, Staula told Toomey that what the latter had written was to the best of Staula's knowledge what had happened, and that to the best of his

knowledge it was true. Toomey did not ask Staula to sign his approval; nor was there any reason so to do for Staula was not a possible party, nor a likely adverse witness who could be impeached, nor a person whose testimony could be used in his absence.

5. There is, in my opinion, no difference of any substance, and hardly any difference in form or order of presentation between what Toomey repeated to Staula and what Toomey had jotted on the pad, or between what Toomey had jotted on the pad and that portion of what Staula told Toomey which had any value as possible testimony at any stage of this case.

6. After Staula left, Toomey used the jottings on his pad to dictate to a disc. Any person who had the jottings before him and had Toomey's knowledge of what Staula said would have dictated the same words to the disc. That is, there is not on the disc any element of art, invention, or originality on the part of the dictator. The disc is a faithful record of the words used by Staula, some recorded [fol. 337] in the jottings, some carried in Toomey's memory. It is as accurate a statement of Staula's account as is permitted by the lot of man (without a stenographer or recording machine). And if the first disc had been destroyed, a second disc containing the same words (without addition or subtraction) could have been recorded either by Toomey or anyone who heard Staula.

On the basis of the foregoing findings based on the *viva voce* testimony of Staula and Toomey, it may be that the Court of Appeals will want to reconsider some of the statements in its opinion. It is doubtful whether it is correct to say that Toomey's "notes were not a running account." Toomey's jottings seem to me to have resembled the best kind of judicial notes—the sort which until two decades ago (when the court reporter act was passed,) were the staple source of records in criminal appeals from the District Courts of the United States. Indeed they were better than judicial notes because not only their substance but their contents, merely re-arranged for order, were read back by Toomey to Staula. As he read back, Toomey looked at the jottings before he spoke each sentence. The correspondence of the talk and the text was not far below that achieved by most readers of texts.

Moreover, that oral presentation, while in narrative form, was an accurate summary of answers Staula had given to Toomey's questions. It had a far higher degree of accuracy than many narrative records that used to be regularly prepared in equity cases under the old practice, and than many narrative records currently prepared in response to rules of Courts of Appeal in many circuits.

In any event, Staula adopted as his own Toomey's oral presentation.

Furthermore, when Toomey dictated to the disc he dictated what I infer was almost *in ipsissima verba* th narrative he had just checked with Staula. This inference is [fol. 338] supported in many ways. Toomey testified that anyone who heard Staula and had Toomey's jottings would have dictated the same words. Toomey also testified, that, if the first disc had been destroyed, he would have dictated the same words to a second disc half an hour later. Finally, the text of the discs, Ex. 3, shows not only a precise quotation within quotation marks, but also many statements which are, examined fairly, indirect discourse.

In short, it is not certain that the expanded record which now exists in this case will lead the Court of Appeals to adhere to the view it expressed on November 7 that "what Toomey . . . told Staula that morning differed to some extent from what was in his notes, and . . . differed also from what he put in his eventual report." (p. 5.)

It may be that the Court of Appeals, in the light of the expanded record, would accept a conclusion that Ex. 3 satisfies sub-section 2 of Section (e) of the Jencks Act, 18 U. S. C. § 3500. If that Court would accept such a conclusion, I would reach that conclusion. For, in my opinion, Ex. 3 is a "substantially verbatim recital", as that phrase is used at page 6 of the Court of Appeal's opinion, even though Ex. 3 is not, as page 9 insists, the result of "stenographic, mechanically electrical, or other recording." I would hope that, in the light of fresh testimony, the Court of Appeals would re-open the decision embodied in the first sentence of the first full paragraph on page 12.

I also conclude that Ex. 3 satisfies sub-section 1, as that sub-section is interpreted at pages 10 and 11 of the opinion of the Court of Appeals. Despite what the Court of Appeals found on the earlier, incomplete record, I am persuaded that Toomey, by glancing down at the jottings and other indications, did in fact "read these words to him" and was not "elaborating it (the text) in recounting back to the witness." (p. 10). At most, Toomey re-ar- [fol. 339] ranged the order of statements, all of which were in longhand on the pad.

It is not necessary for me to go further and consider the appropriate relief which should follow if my findings and conclusions are acceptable to the Court of Appeals. That Court is still seised of the appeal. Its judges are as mindful as I that at the root of this case is not a mere schoolmaster's problem of construing the ambiguous language of a legislature, but the protection of the fundamental right of any defendant in a criminal case to impeach a witness by a substantially verbatim statement he previously made and which he has adopted and approved. Seldom indeed is there such a clear showing as there has been here that Ex. 3 is a witness's substantially verbatim statement made on the day following a crime.

/s/ Wyzanski, D. J.
United States District Judge

[folios 340-341] * * *

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5847

ALVIN R. CAMPBELL ET AL., DEFENDANTS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Melvin S. Louison and *Lawrence F. O'Donnell* for appellants.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

SUPPLEMENTAL OPINION OF THE COURT—May 22, 1962

WOODBURY, *Chief Judge*. This opinion supplements the opinion of this court of November 7, 1961, wherein, while retaining jurisdiction generally, we directed return of the original papers to the district court for further proceedings before another judge. Further proceedings were had as directed and the court's findings and conclusions are before us on briefs and arguments.

Before turning to those findings and conclusions a brief resume will be helpful.

This court originally affirmed the appellants' sentences for bank robbery, giving only brief consideration to the question of their right under the Jencks Act, 18 U.S.C. [fol. 343] § 3500, to have access to a so-called "Interview Report" of the FBI agent who investigated the robbery the day after it happened. *Campbell* v. *United States*, 269 F.2d 688, 690 (C.A. 1, 1959). On certiorari, *Campbell* v. *United States*, 365 U.S. 85 (1961), the Supreme Court

described the Interview Report and its origins and basis in detail and remanded to the District Court for further findings, saying at pages 93 and 94 that the aid of extrinsic evidence was required to answer four specific questions. These questions in substance were: (1) Whether the FBI agent, Toomey, wrote down what the witness, Staula, told him at the interview, and if so, whether Toomey gave Staula the paper to read to make sure that it was right and did Staula sign it? (2) Was the Interview Report the paper described by Staula or a copy of it?[1] (3) If the Interview Report was neither the original nor a copy of the paper Staula described, what became of the paper? and (4) "In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? . . .[2] Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously?"[3]

The District Court on that remand held a further hearing after which it made findings of fact and drew conclusions of law and the case again came before this court [fol. 344] on appeal. *Campbell* v. *United States*, 296 F.2d 527 (C.A. 1, 1961). We found the hearing unsatisfactory in a number of respects. Nevertheless, we found it adequate to provide the answers to some of the questions propounded by the Supreme Court.

As we understood the opinion of that Court in this case subsection (1) of section (e) of the Jencks Act defining

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[1] With respect to this question the Court commented that in either event the Report would be a producible statement under § (e)(1) of the Act, for that section is not limited in its application to statements actually written by a witness but includes statements written by another if signed by the witness or "otherwise adopted or approved" by him in which event a signature was not necessary.

[2] The Court said that if Staula had read over and approved the Interview Report it would be admissible under § (e)(1) even though "not related" to the paper Staula described.

[3] Commenting on the second part of this question the Court said: "If extrinsic evidence established this, the report would be producible under subsection (e)(2)."

the statutory meaning of a "statement" as ". . . a written statement made by said witness and signed or otherwise adopted or approved by him" covered not only statements written by the witness himself but also statements orally made by a witness but written down by someone else provided the witness "signed or otherwise adopted or approved" the writing although it did not follow the words of the witness "substantially verbatim." And we held that subsection (2) of section (e) quoted in the margin [4] was limited to oral statements of a witness taken down contemporaneously by a stenographer or recorded mechanically or electrically or in some equivalent way, which would assure production by transcription, perhaps later, of a "substantially verbatim recital" of what the witness said.

Applying the facts as then found, indeed the undisputed facts, to our understanding of the statute we held that the Interview Report was not a statement within (e) (2), because it was not in Staula's words but in Toomey's. Moreover, the Interview Report cannot qualify as a statement under this subsection because Toomey's recording onto the disk, which was later transcribed and became the Interview Report, was not contemporaneous with Staula's oral statement to Toomey. Toomey interviewed Staula around noon but did not dictate from his notes onto the disk until [fol. 345] evening. This answered in the negative the last part of the fourth question propounded by the Supreme Court and the only one with respect to subsection (e) (2). Wherefore we concluded that the Interview Report was not producible under subsection (e) (2) but could only be producible if it were a "statement" within the definition of subsection (e) (1).[5]

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[4] "(2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

[5] The court below, no doubt from an excess of caution, allowed counsel for the defendants over government counsel's objection to elicit evidence bearing upon producibility under subsection (e)(2) and made findings on that evidence. Adhering to the views previously expressed we shall not comment on that evidence or the findings based thereon.

We thought the findings of the court below on the question of the producibility of the report under this subsection were not completely satisfactory. Nevertheless we found the record made at that hearing adequate to answer some of the other questions propounded by the Supreme Court. We found on Toomey's testimony, Staula had not testified, that at the interview Toomey took longhand notes of what Staula said, occasionally using symbols and abbreviations; that after the interview Staula was not shown the notes and did not sign or initial them, but that Toomey had recited the "substance" of the notes back to Staula and that Staula had said that Toomey "had the story straight." Then we found that Toomey attended to other matters for the rest of the day and that evening dictated his so-called Interview Report onto a disk in a machine. In doing so we found that Toomey had not dictated his notes but had first rearranged them in chronological order and then, relying primarily on his notes but also on his memory, and using his own language, had dictated a report that "reflects the information in the notes." We found that Toomey sent the disk to the Boston office of the FBI to be transcribed and upon receipt of the transcription a few days later checked it against his notes and finding it [fol. 346] accurate destroyed his notes in accordance with standard FBI practice. Toomey did not show his report to Staula and did not interview him again.

These findings disposed of most of the Supreme Court's questions. However, Staula had not been called to testify at that hearing and at the trial he had testified that, although he could not clearly remember, he thought that ". . . they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now, I am not sure." *Campbell* v. *United States*, 365 U.S. 85, 89 (1961), footnote 2. There being a discrepancy between this testimony and Toomey's, and Staula not having testified at the hearing on the Supreme Court's remand, we, while retaining jurisdiction generally, remanded to the District Court ". . . for further hearings and findings, with Toomey and Staula both to testify, as to whether Staula signed or otherwise adopted or approved the notes, in order that the mandate of the Supreme Court be fully complied with."

After a hearing on this remand the court below found, 199 F. Supp. 905, that Staula had not signed his approval of Toomey's notes. Nor did it find that Toomey had purported to read his notes back to Staula in just the order or in the exact words written down by Toomey on his pad. It did find, however, that: "At the end of the reading, Staula told Toomey that what the latter had written [actually on the undisputed testimony Staula never saw what Toomey had written] was to the best of Staula's knowledge what had happened, and that to the best of his knowledge it was true." And the court below found that in its opinion there was ". . . no difference of any substance, and hardly any difference in form or order of presentation, between what Toomey repeated to Staula and what Toomey had jotted on the pad and that portion of what Staula had told Toomey which had any value as [fol. 347] possible testimony at any stage of the case." On the basis of these and similar findings of close correspondence between Toomey's notes, what Toomey had recited to Staula from those notes and what Toomey had dictated on the disk from which his Interview Report was transcribed, the court below concluded that in its opinion the latter was a "substantially verbatim recital" of what Staula had said to Toomey.

These latter findings go to the verge, if not perhaps beyond the scope, of our mandate. However, even if we were to accept them our opinion would not be changed.

Slight changes in phraseology can often work vast changes in meaning. And in *Palermo* v. *United States*, 360 U.S. 343, 350 (1959), the Court, referring to legislative history, said that Congress felt it would ". . . be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." Moreover, to determine what language appearing in the Interview Report had actually been used by Toomey and approved by Staula when Toomey recited from his notes to Staula after the interview, imposes a subtle and exceedingly difficult if not impossible problem for the district court.

Furthermore, to delete from the Interview Report the words not approved by Staula would result in his being confronted on cross-examination with his words out of context. Therefore we think we must assume that when the Court in its opinion in the present case at pages 93 and 94 used the word "copy" in the questions it propounded with respect to subsection (e) (1) it meant just what it said and not something less than a copy, barring perhaps minor misspellings, typographical errors and the like.[6]

[fol. 348] Construing "copy" as used by the Court as meaning not almost a copy or anything less than a copy, we now categorically answer the Supreme Court's questions as follows: (1) Toomey did not write down what Staula told him at the interview but at the most only the essence or substance, in part in his own words, of what Staula told him and Toomey did not give the paper to Staula to read or read it to him word for word to make sure that it was right nor did Staula sign it; (2) the Interview Report was neither the paper described by Staula nor a copy of it; (3) that paper was destroyed by Toomey in accordance with FBI practice[7] and (4) Staula did not read over and approve, indeed he never even saw, the Interview Report. The second part of question (4) we have already answered.

Judgments will be entered affirming the judgments of the District Court.

ALDRICH, *Circuit Judge*, (concurring). While the court is perhaps right that subsection (2) does not require further comment, in case someone might think otherwise I might point out that the court found, on unimpeached testimony, that the disc from which the report was transcribed constituted Staula's words, "some recorded in the

[6] The foregoing discussion applies to subsection (e)(1) not to subsection (e)(2) containing the "substantially verbatim" phrase.

[7] We considered the consequences flowing from this in the opinion which this one supplements.

jottings [notes], some carried in Toomey's memory." It must follow that the notes contained less than what Staula told Toomey and less than what Toomey later dictated. Thus it must be clear that the notes were not the "substantially verbatim recital" described in section (e) (2). I do not gather the district court purported to find they were. It so described the combination of notes and mem- [fol. 349] ory which was the report. But section (e) (2) requires a "stenographic, mechanical, electrical, or other recording," "recorded contemporaneously with the making of such oral statement," not one prepared in the present manner a number of hours later.

With respect to section (e) (1) if this court is in error and the decision should turn on the correctness or incorrectness of the district court's findings I do not think that all of them should stand. The principal basis for the court's finding, concededly an inference, that what "Toomey dictated to the disc . . . was almost *in ipsissima verba* the narrative he had just checked with Staula," was stated by the court to be Toomey's testimony that "anyone who heard Staula and had Toomey's jottings would have dictated the same words," and that "if the first disc had been destroyed, he would have dictated the same words to a second disc half an hour later." This was less than a precise representation of the testimony. While I do not wish to quibble, the witness twice added to "hearing Staula," the broader qualification "[who had] the same knowledge of the case." Rather than the phrase "the same words" twice used by the court, on the first occasion the witness stated, "substantially the same thing," and on the other that the second disc would be "substantially the same."

The court's emphasis on *ipsissima verba* is heightened when one realizes that "just checked with Staula" means checked some seven hours before. I cannot bring myself to believe that the checking back with a witness at noontime of a consolidation of jottings and memory, and the dictation of a report in the evening, would result in the identity inferred by the court. If it happened it would be a surprising coincidence. I agree with my brethren that the statute is not satisfied in such a manner.

[fol. 350]

IN THE UNITED STATES COURT OF APPEALS

* * * * *

JUDGMENT—May 22, 1962

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgments of the District Court are affirmed.

By the Court:

/s/ Roger A. Stinchfield
Clerk.

Approved:

/s/ Peter Woodbury
Ch. J.

Thereafter, on May 31, 1962, the following petition for rehearing was filed:

[SEAL]

[fol. 351]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Title omitted]

PETITION OF DEFENDANTS-APPELLANTS FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the First Circuit:

Alvin R. Campbell, Arnold S. Campbell, and Donald Lester, the defendants-appellants above-named, present this, their petition for rehearing in the above-entitled cause, and, in support thereof, respectfully show:

I.

Petitioners request this Honorable Court to reconsider this matter in at least one very important aspect which is a question that was neither discussed nor answered in the Opinion of November 7, 1961, or the one of May 22, 1962. The question is: If they were still in existence, would the notes made by Agent Toomey in the presence of Staula in the Canton Police Station on the day following the robbery qualify under subsection (e)(1) of the Jencks Statute—18 U.S.C. § 3500.

This is important for the following reasons: At the time this case was argued orally before the Supreme [fol. 352] Court, Justice Frankfurter asked if the claim was being made that the notes were destroyed in bad faith. This was because the defendants claimed the statutory sanction of striking the testimony of the witness should have been applied under subsection (d) of the Statute regardless of whether they were destroyed in good faith or bad faith, i.e., the reason was immaterial. Justice Frankfurter clearly inferred that he felt the sanction should not be applied unless the notes had been destroyed in bad faith. The majority opinion of the Court expressly raises this question and says it needs further answers which this Honorable Court has apparently overlooked. The Supreme Court said: (365 U.S. at 98)

> "If the Interview Report was not the original or a copy of the paper Staula described, and that paper was destroyed, the petitioners were denied a statement to which they were entitled under the statute. Thus, even if the Interview Report were itself producible, a situation might have arisen calling for decision whether subsection (d) of the statute required the striking of the testimony of the witness. . . . (arguments of both sides about good faith and bad faith in destroying notes) . . . However, this record affords us no opportunity to decide *this important question* of the construction of subsection (d). We do not yet know that such a paper existed, or the circumstances of its destruction . . ." (Emphasis added).

It now appears that Toomey did make notes at the time of the Interview and that they were destroyed as a matter of routine procedure after the Interview Report was transcribed and checked over for accuracy. Petitioners claim that these notes themselves very definitely qualified under subsection (e)(1), Toomey took notes of what Staula said. This is undisputed. Concededly, he omitted items such as fooling the robbers out of taking his own money by showing it in his pocket and of being afraid of being locked in the vault. In the face of the thrice-ex- [fol. 353] pressed views of this Court, petitioners do not ask that its qualifications under (e)(2) be reconsidered by this Court. However, omitting (e)(2) and the Interview Report from this discussion, it is very clear that Staula approved of the contents of the notes Toomey wrote in the Canton Police Station. Toomey's own demonstration to the District Judge of how he read the notes back to Staula and the answer Staula then gave Toomey show this conclusively to be so.

Acting on this premise, the original notes, *if still in existence*, would be producible under (e)(1). However, they have been destroyed and apparently not in bad faith. Where does that leave us? We now come to the use of the word "copy" by the Supreme Court in *Campbell* and by this Court in its most recent opinion. What the Supreme

Court meant by "copy" was actually an application of the secondary evidence rule. By that, they meant that if the *original* notes were admissible and destroyed for *any* reason but a copy of them existed, then the copy would be producible and subsection (d) would not come into play at all. On the other hand, if the original notes were producible and destroyed and no copy existed, then we reach the question raised under subsection (d). Under that, we have the question of good faith or bad faith or as petitioners claimed in the Supreme Court, the question of intent being immaterial.

This Court has now ruled that no "copy" of the original notes exists (although appellants cannot be sure that this Court has in fact ever ruled on the question of producibility of the original notes). On that basis, the question under subsection (d) is squarely raised and has not even been mentioned in either Opinion of this Court in the present case—No. 5847.

[fol. 354] Based on this background, petitioners respectfully, but nevertheless very strenuously, submit that the interpretation of the word "copy" by this Court is too restrictive. If this Court still adheres to its former view of this word, however, then reargument, either oral or written, is called for on the issue raised on the effect of subsection (d).

In the first Opinion in this present case, the Court said (269 F. 2d at 532):

> "But he (Toomey) did not purport to show him (Staula) the words that he had written, *or to read those words to him.*" (Emphasis added)

It now seems that in fact he did read the words in his notes back to Staula (See Supp. R.A. 26-27). Likewise, Staula said that what Toomey read back to him was true, or words to that effect. In any event, Staula clearly stated that an F.B.I. Agent did read the notes back to him (See Supp. R.A. 16, 18). This is unequivocal.

In other words, it is respectfully submitted that if the original notes were still in existence, it would be undisputed on this record that they would be producible under (e)(1). This is in accord with what Chief Agent Laughlin

testified in the first record was the method and purpose of these interview notes.[1]

The District Judge in the opinion reprinted at 199 F. Supp. 905 did not reach this issue under subsection (d) at all as indeed, it was not within the scope of the issues raised by the testimony before him.

[fol. 355] Petitioners respectfully submit that this question should be decided by this Court.

II.

It is undoubtedly so that the so-called Jencks Statute—18 U.S.C. 3500—was enacted for the protection of the F.B.I. and its interest in maintaining secrecy as to many documents in its possession. However, that does not mean that once enacted the statute must be strictly and restrictively construed for the protection of the F.B.I., as was intimated by this Court in its opinion, reprinted in 296 F. 2d 527 at 531.

In fact, discovery of witness statements was neither invented by the *Jencks* case nor was it ended by the Jencks Statute. It must be borne in mind that both *Palermo* and *Campbell* show that this statutory method of obtaining witness statements is an exclusive method. It even superseded Rule 17 of the Federal Rules of Criminal Procedure in that respect.

In this respect, the Supreme Court said in Campbell, 365 U.S. at 92:

> ". . . the Jencks Act 'reaffirms' our holding in *Jencks* v. *United States*, 353 U.S. 659, that the defendant on trial in a federal criminal prosecution *is entitled*, for impeachment purposes, to relevant and competent statements of a government witness in possession of the government touching the events or activities as to which the witness has testified at the trial. . . . The *command* of the statute is thus designed to further

[1] The Supreme Court does not intimate at all that a question under subsection (d) could only arise if bad faith were shown. In this case, neither good faith nor bad faith is shown. They destroyed notes as a matter of routine. The question is squarely raised.

the fair and just administration of criminal justice, a goal of which the judiciary are the special guardians." (Emphasis added)

It is respectfully submitted that the interpretation of at *least* subsection (e)(1) should be interpreted in the [fol. 356] light of the above, especially with regard to the application of subsection (d).

WHEREFORE, upon the foregoing grounds and such others as this Honorable Court may seem fit to utilize, it is respectfully urged that this petition for rehearing be granted and that the judgments of the District Court, upon further consideration, be reversed.

By their Attorneys,

/s/ Melvin S. Louison
MELVIN S. LOUISON

/s/ Lawrence F. O'Donnell
LAWRENCE F. O'DONNELL

CERTIFICATE OF COUNSEL—(Omitted in Printing)

[fol. 357] * * *

[fol. 358]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5847

ALVIN R. CAMPBELL ET AL., DEFENDANTS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Melvin S. Louison and *Lawrence F. O'Donnell* for appellants.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT

ON PETITION FOR REHEARING—June 26, 1962

WOODBURY, *Chief Judge*. In our opinion of November 7, 1961, 296 F.2d 527, we said that the Jencks Act imposed no duty on the agents of the FBI to take the statements of witnesses and no duty, at least in the absence of bad faith, to keep any statements that might have been taken. Therefore, there being no evidence from which it could possibly be found that Toomey destroyed his notes in bad faith, the question propounded by this petition for rehearing whether his notes, had they not been destroyed, would be producible under subsection (e)(1) of the Act

[fol. 359] is academic. The petition for rehearing is denied.

ALDRICH, *Circuit Judge*, (concurring). Appellants make no contention that the original notes were destroyed in bad faith. Nonetheless, the Supreme Court indicated the possibility of consequences unfavorable to the government even if the destruction were innocent. Consequently, in our opinion of November 7, although we indicated our own views that it was legally immaterial, we instructed the district court to determine "whether Staula . . . adopted or approved the notes, in order that the mandate of the Supreme Court be fully complied with." The court now states that appellants are not entitled to an answer to this question because of its immateriality. I confess that because of my belief that the answer should not make any difference I overlooked the fact, when concurring in the court's decision of May 22, 1962, that it had not been given.

On the present posture the case stands thus. The district court, on the last remand, found that the interview report itself satisfied the requirements of subsection (e) (1). It did not expressly find, and it does not necessarily follow, that the court thought the notes themselves satisfied this section. Possibly the court would have so found had it adverted to the question more specifically, but on the record it seems likely that had it done so considerations which impermissibly entered into its determination with respect to the report would also have entered here, and that equally we might have been obliged to set the finding aside. However, in the absence of a finding we need not pursue this question.

[fol. 360] Strictly, as I see it, the matter immediately before us is whether to send the case back to the district court now for a specific finding with respect to the notes. Since no finding by the district court would change our ultimate decision and appellants would have to go to the Supreme Court in any event, and since that court may well conclude that the character of the notes is of no consequence where their destruction was in entire good faith, I will not dissent from the denial of the petition for rehearing.

[fol. 361] IN THE

UNITED STATES COURT OF APPEALS

* * * *

ORDER OF COURT DENYING PETITION FOR REHEARING —June 26, 1962

It is ordered that the petition for rehearing filed May 31, 1962 be, and the same hereby is, denied.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By /s/ Dana H. Gallup,
Chief Deputy Clerk.

Thereafter, on July 3, 1962, mandate issued.

[fol. 362]

CLERK'S CERTIFICATE— Omitted in Printing

[fol. 363]

SUPREME COURT OF THE UNITED STATES

No. 296 Misc., October Term, 1962

ALVIN R. CAMPBELL, ET AL., PETITIONERS

vs.

UNITED STATES

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—Dec. 3, 1962

On petition for writ of Certiorari to the United States Court of Appeals for the First Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 631 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 3, 1962

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 671705 789

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 631

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL,
and DONALD LESTER,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts

LAWRENCE F. O'DONNELL
One State Street
Boston, Massachusetts

Counsel for Petitioners

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No 31

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Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The last opinion of the Court of Appeals (R. 135-141; 148-149) is reported at 303 F.2d 747. This was a supplemental opinion to an earlier opinion of the Court of Appeals which is reported at 296 F.2d 527 (R. 86-97). Opinions of the District Court pertaining to this appeal are reported at 199 F. Supp. 905 (R. 130-134) and 206 F. Supp. 213 (R. 75-79). Earlier opinions of the Court of Appeals and of this Court in this case are reported at 269 F.2d 688 and 365 U.S. 85.

Jurisdiction

The judgment of the Court of Appeals was entered on May 22, 1962 (R. 142). Petition for Rehearing was denied on June 26, 1962 (R. 150). The petition for a writ of certiorari was filed on July 21, 1962, and was granted on December 3, 1962 (R. 151), 371 U.S. 919. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether or not the sanctions of 18 U.S.C. 3500, subsection (d) may be applied only if "bad faith" be shown where the original notes of an F.B.I. Agent have been destroyed, and if so, what constitutes "bad faith" under such a doctrine.

2. Whether the phrase "substantially verbatim" as used in 18 U.S.C. 3500, subsection (e)(2) means "actually verbatim", "substantially accurate" or "a fairly comprehensive reproduction of the witness' words".

(a) What is the statutory definition of the phrase "contemporaneously recorded" as used in 18 U.S.C. 3500, subsection (e)(2).

3. Whether or not interview notes made by an F.B.I. Agent in the presence of a witness which are read back to the witness and which are approved by the witness are producible as a statutory statement under 18 U.S.C. 3500, subsection (e)(1).

(a) Would the result posed by Question No. 3 differ if the F.B.I. Agent's narrative in going over the interview with the witness included everything in his notes and also some additional words or matters where the witness approved the entire narrative *in toto*.

4. Whether or not an Interview Report which is a third person transcription of interview notes and which is checked for accuracy against the notes is a "copy" of the interview notes as that word "copy" was used by this Court in *Campbell*, 365 U.S. at 93.

5. If the original interview notes of the Agent have been destroyed and regardless of the reason for the destruction, does the Interview Report, which is a "copy" of the notes, become producible either as a statutory statement under (e)(1) or (e)(2) or both in lieu of the notes or as secondary evidence in lieu of the sanctions of 18 U.S.C. 3500, subsection (d).

Statute Involved

The statute involved is Title 18 U.S.C. §3500—the so-called Jencks Act. This statute is set out in its entirety in the Appendix, *infra*.

Statement

The petitioners here were convicted of bank robbery and each was sentenced to a term of a twenty-five years imprisonment. On certiorari (365 U.S. 85), this Court remanded the case for further proceedings without vacating the convictions. Further proceedings were had before McCarthy, *D.J.* (R. 1-74). He reimposed the same sentences (R. 80-85). On appeal, the case was again remanded under directions by the court below (R. 86-97, 99). Further proceedings were held before Wyzanski, *D.J.* (R. 100-129). On further appeal, the court below affirmed the judgments of the District Court (R. 142). The court below subsequently denied a petition for rehearing (R. 150). The case is now before this Court on a writ of certiorari to

the Court of Appeals for the First Circuit, the petition for a writ of certiorari having been granted on December 3, 1962 (R. 151). All issues presented pertain to the so-called Jencks Act—18 U.S.C. 3500.

1. F.B.I. Agent John F. Toomey testified in both remand proceedings in the District Court (R. 1-49; 109-128). On the day following the robbery, Mr. Toomey interviewed the witness Staula in the Canton, Massachusetts, police station (R. 2, 109-110). He made notes of what Staula told him (R. 3, 4). He interviewed Staula in the morning (R. 2) and later that evening, he went back to his office in Brockton and dictated from these notes to a disc on a dictating machine (R. 30). The disc was sent to the Boston F.B.I. office for transcription. Some five or six days later, he received back what is now called the Interview Report (see 365 U.S. at 90) from Boston for approval (R. 17). He checked the Interview Report with his notes to make sure it was an accurate transcription of his notes. After being satisfied it was an accurate transcription of his notes, he destroyed his notes in accordance with customary and standard practice of the F.B.I. (R. 16-17, 18, 23, 41-43, 124-125). However, Leo Laughlin, then the Agent-in-Charge of the Boston F.B.I. office testified that the destruction of these notes is optional with each agent (R. 60-62).

2. Agent Toomey interviewed Mr. Staula on the day following the robbery (R. 2). The interview lasted for a half hour (R. 11, 27) and his notes were written on a lined pad (R. 9) of standard size, 8½ x 11 (R. 11). Agent Toomey took notes while Staula recited his experiences, and then he asked Staula questions and took notes of his answers (R. 7). He then went over his notes with Mr. Staula in narrative form to be certain the story was accurate (R. 7, 27, 113). See also the description by the judge

of exactly what the Agent said and did in going over his notes in narrative form with the witness Staula (R. 114-115).

Agent Toomey called the Interview Report a "typewritten transcript of the interview" (R. 17). The Interview Report contained everything that was in his notes (R. 18) and the descriptions and one other statement were quotes of Staula's own words (R. 22, 29, 118-119). The use of third person phrases or words of indirect discourse, such as "It was stated . . ." and "Mr. Staula went on to state . . . " was "to reflect statements made by the witness Staula" (R. 22). The Interview Report was produced from the notes (R. 44) and has the same meaning as the notes (R. 26). The only things not in the notes that were in the Report were certain adjectives, completely spelled out words instead of abbreviations, and introductory and third person phrases (R. 25-26, 34-38). There was nothing in the notes that is not contained in the Report (R. 25).

The only matters stated by Staula at the interview which were not contained in the Agent's notes were about hiding his own money and being afraid of getting locked in the vault (R. 31, 36). However, he had complete notes on all pertinent information (R. 32) and relied primarily on his notes in dictating the Interview Report (R. 32-33).[1] Anyone who had the same knowledge of the case that Toomey had would have been able to make the same transcription of his notes that he had made (R. 120-121). Toomey did not change any observations made by Staula (R. 128) and the only difference between what was in his notes and what Staula told him was that he, Toomey, put it in narrative form (R. 127, 128).

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[1] See conclusions in this regard in the opinion of Judge Wyzanski in 199 F. Supp. 905 at 906-907 (R. 131-133).

If Toomey had lost the disc he had dictated on from his notes and dictated a second disc from his notes a half hour later, the recordings on the two discs would have been substantially the same (R. 128).

3. This section involves approval of the notes under subsection (e)(1) of the statute. The relevant facts from section No. 2 immediately above are incorporated herein by reference. As stated therein, Mr. Toomey took notes of what Staula told him and also of Staula's answers to his questions (R. 7). He then double checked his notes with Mr. Staula (R. 7) by going over the entire story in narrative form, reading from his notes as he did so sentence for sentence (R. 115). When he read to Staula, as nearly as he could, he incorporated the exact words in his notes into the narrative form of his statement to Staula (R. 119). He checked with Staula as to the accuracy of his notes (R. 115-116). Mr. Staula himself testified that Toomey read the paper he was writing on back to him (R. 105) and Staula told Toomey that to the best of his knowledge, the notes he read back were true accounts of what happened (R. 107). (See also R. 7-8.)

Agent Toomey testified that his notes contained the whole story given him by Staula (R. 20) and he did not recall going over anything with Staula that was not in his notes (R. 21). His one objective in taking notes was to get the whole story from Staula (R. 14). He had received training in interviewing witnesses and used his training in this interview (R. 15).

Agent Laughlin testified that an F.B.I. Agent would reduce all pertinent information derived from a witness to writing in his notes (R. 66) and that an Agent is taught to go over his notes with a witness and inquire whether the story is as he has it or is a recitation of the story as the witness gave it (R. 69).

4. This issue here is as to whether or not the Interview Report in this case is a "copy" of the Agent's investigative notes. Some of the facts relevant hereto have already been included in sections Nos. 2 and 3 of the Statement section of this Brief and are incorporated herein by reference.

There was nothing in the notes that was left out of the Report (R. 18) and the Report has the same meaning as his notes (R. 26) and reflects the information furnished him by Staula (R. 27). The notes were not destroyed until they were compared with the Report for accuracy and the transcript or Report found to be accurate (R. 16-17, 23, 124-125). The Interview Report is neither a photocopy nor a carbon copy of the notes (R. 23) nor an absolutely identical copy of the interview notes. The only matters not in the notes which are included in the Report are words of indirect discourse, spelled-out words instead of abbreviations, and certain adjectives. In all other respects, including verbatim descriptions and a quotation, the Interview Report and the interview notes contain the same information and have the same meaning.

5. This issue presupposes an affirmative answer to Question No. 4, i.e., that the Interview Report is a "copy" of the interview notes. Of course, if the Report is not a "copy" of the notes, then we have a situation where the government will claim that the Interview Report is not producible as a "statement" under (e)(1) or (e)(2) nor as a "copy" of the interview notes. The issue would then be raised as to whether a defendant in a criminal trial would have any rights to discovery or any remedy for the lack thereof where the original notes are destroyed in subjective good faith and the defendant has not been furnished the information in any other manner. This Court recognized the importance and complexity of this issue and posed it in the first *Campbell* case, 365 U.S. at 98. The court below in effect

held that a defendant in such a case is without remedy since, in the absence of bad faith, the question of the statutory quality of the original notes is "academic" (R. 148-149).

Summary of Argument

The approach to be submitted by the petitioners to the overall question of discovery in a criminal case under 18 U.S.C. 3500 is that within the statute, a defendant on trial has a right to discovery, perhaps even a constitutional right since the statute, to the extent that it goes, reaffirms the holding of this Court in the *Jencks* case.[2] See *Campbell* v. *United States*, 365 U.S. 85 at 93. Therefore, it is submitted that discovery is to be had fairly liberally within the framework of, and under the limitations set by, the statute.

1. Petitioners argue that once a defendant establishes a foundation under the statute for the production of a "statement", i.e., shows a prima facie entitlement to the production of a document, he has a vested right under the statute to get either the statement or the equivalent information. Failing thereof, he is entitled to have the sanctions of subsection (d) imposed. The petitioners have maintained throughout all these proceedings that the phrase "in the possession of the United States" meant in the government's possession at any time and not at the precise time the document is called for production. Since the statute was obviously enacted for the benefit of the Government, the Gov-

[2] Even under the harmless error doctrine of *Rosenberg* v. *United States*, 360 U.S. 367, the very least a defendant would be entitled to would be some document containing the same information as the document denied to him or unavailable due to destruction. See also *Killian* v. *United States*, 368 U.S. 231, 244.

ernment should have no right to destroy such a "statement" even if done in subjective good faith. The destruction of the notes and the alleged absence of any other producible document in its place may certainly constitute bad faith when looked at by an objective standard. Otherwise, it is a foolproof device for avoiding discovery under the statute. Under the guides set out for statutory construction, there is a presumption against the enactment of a useless statute.

2. The phrase "substantially verbatim" was never intended to mean actually verbatim with perhaps a little leeway for a typographical error or the inclusion of an occasional meaningless word as was suggested by the court below. All the decisions of this Court to date point to a contrary conclusion. The test of "substantially accurate" as used by Judge Wyzanski in his opinion (R. 131 *et seq.*) is a fair and equitable one and protects the rights of the Government and the defendant as well as the witness, if the protection of the witness is in any manner relevant hereto.

If an Agent makes notes while the interview is in progress and at some later time, the Agent dictates a Report from the notes, then the Report is a contemporaneously recorded document within the meaning of subsection (e)(2).

3. There should be nothing less in dispute in this case than that Agent Toomey went over his notes with Staula and received either actual or tacit approval of his notes. It must be borne in mind that it is not the story of the witness that is subject to approval under subsection (e)(1) but rather the agent's notes, regardless of how they are written or what they contain. The only question that should be in issue is whether the matter of approval of the notes is now moot or academic because the notes have been destroyed. The court below says it is; the petitioners submit it is not.

4. The petitioners submit that an Interview Report which is made from investigative notes, has the same meaning as the notes, contains all the information that is contained in the notes, and has nothing added except introductory words, certain adjectives, words of indirect discourse and spelled-out words instead of abbreviations is a "copy" of the investigative notes.

5. Where there is a right, there must be a corresponding obligation, or at least some form of remedy for the possessor to enforce his right or to seek redress for the violation or denial of his right. At this point, assuming *arguendo* that this Court should now hold that having in mind the requirements of the Sixth Amendment, the legislative history of this Act, and the *Jencks* and the first *Campbell* cases, a defendant has a right to discovery within the statute, then an Interview Report which is a "copy" of the investigative notes should stand in the place of the notes either under (e)(1) or (e)(2) regardless of whether the Interview Report, standing by itself, would be producible under (e)(1) or (e)(2).

ARGUMENT

Introduction

The court below has construed this statute—18 U.S.C. 3500—in a very restricted manner and applies super-literalistic standards throughout its discussions of the statute. It makes the statute almost impossible to comply with as a practical matter, and from a point of view of due process to a defendant on trial in a criminal case, it gives him almost no rights at all to discovery under the statute. The court said that "the primary consideration (in enacting the statute) was protection of the F.B.I." and that the F.B.I. "has a legitimate interest in maintaining secrecy on a broad base" (R. 91). The court went on to say (R. 92):

> "... If, for any reason, valid impeachment material does exist, a defendant is entitled to have the benefit of it. But this is, in a sense, a windfall, rather than the performance of a duty owed. The word 'windfall' may sound alarming, but either there is a duty owed or there is not. We do not find in the statute any such duty...."

Standing opposed to that language of the court below, in the view of the petitioners, is the language of this Court in *Campbell* v. *United States*, 365 U.S. 85, 92:

> "...To that extent, as the legislative history makes clear, the Jencks Act 'reaffirms' our holding in *Jencks* v. *United States*, 353 U.S. 657, that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at the trial.... The command of the statute is thus designed to further the fair

and just administration of criminal justice, a goal of which the judiciary is the special guardian."[3]

Petitioners submit that the very limited and restrictive approach taken by the court below was unwarranted in view of the express, above-quoted language of this Court in *Campbell*.

Perhaps the key to this entire problem rests in the settling finally, through this case, of the approach to be taken. In the view of the petitioners, the rationale of *Campbell* is that discovery is to be had on fairly liberal terms within the framework of the statute. It is quite obvious that the Act limits the type of material that can be called for and the time when production can be demanded. It is also quite clear, however, that once the basic requirements of the statute have been met, discovery does not thereafter depend on the art of semantics and hairsplitting.[4]

In that respect, petitioners submit that phrases used in the statute such as "statement", "substantially verbatim", and "contemporaneously recorded" have special meanings under the statute and are not necessarily limited at all by dictionary definitions. Obviously, a statutory "statement" can be anything at all that meets the requirements of the Act. In *Killian* v. *United States*, 368 U.S. 231, the Government frankly conceded that a receipt was in fact a statutory "statement". Likewise, an Interview Report or an Agent's notes could be a statutory "statement".

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[3] The holding of this Court in the *Jencks* case is so well known as not to require repetition here.

[4] In construing the definition of the word "copy" as used by this Court in the earlier *Campbell* case, the court below applied such a restricted standard that it was forced to resort to the use of a footnote to explain to a reader that they were discussing (e)(1) and not (e)(2) containing the "substantially verbatim" phrase.

The same is also true of the phrase "substantially verbatim". From a dictionary standpoint, that which is verbatim is not merely substantial and that which is substantial is not verbatim. Therefore, it can be seen that this phrase must receive a definition applicable to this Act, and it must not be one which is so strict as to limit the function of the statute which is "to further the fair and just administration of criminal justice".

The following arguments, based upon each of the questions presented, are submitted on the theory that the Act does give a defendant a "right" to discovery within the limitations of the Act and that the language of the Act is not intended to unduly restrict discovery after the preliminary conditions of the Act have been met.

1.

The Application of the Sanctions of Subsection (d).

On this point, the court below held that only on a showing of bad faith could a motion to strike be granted under subsection (d).[5] This is perhaps an oversimplification of what is not only an important problem but also a rather complex one.

The petitioners have at all times maintained that destruction of the notes for any reason should be regarded as the equivalent of noncompliance with an order to produce under subsection (d). The use of the phrase in subsection (b) "in the possession of the United States" meant in the possession of the United States *at any time* and not just

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[5] Based on this, the court below held that the question of whether the original notes would be producible if they had not been destroyed is academic (R. 148-149). This will be argued *infra* in this Brief.

at the precise moment in a trial when a statutory order to produce is made. To limit this time only to the time when the order to produce is made makes the problem fraught with dangers of unfairness and opens up subsidiary questions of whether the government might be guilty of chicanery in giving any reason for nonpossession at the time of the order. The court below held there was no duty whatever on the government to preserve notes (R. 92), and this brings up the question again of "bad faith".

The question arises as to whether bad faith is to be judged by an objective or subjective standard. A defendant would rarely, if ever, be able to make a showing of subjective bad faith, and an objective standard would be much fairer to defendants and provide definite guidelines for governmental conduct. Since the testimony was, and the court below found, that the notes were destroyed in accordance with standard F.B.I. practices (although, in fact, the destruction of notes is optional with each agent), failure to adopt the objective standard as a rule of law would amount to an open invitation to circumvent the Jencks Act by means of the very type of practice employed, apparently in subjective good faith, in the instant case. Cf. *People* v. *Betts*, 272 App. Div. 737, 74 N.Y.S. 2d 791 (1st Dept., 1947), where the New York Appellate Courts held that a police officer's destruction of his notes to avoid being cross-examined therefrom constituted "bad faith" as a matter of law notwithstanding the trial court's finding of subjective good faith on the part of the officer.

The case at bar is not a case such as *Rosenberg* v. *United States*, 360 U.S. 367, 371, where this Court said that a "court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled . . ." There is no doubt in this case but that the petitioner Lester

was convicted solely on the testimony of Staula and that Staula had some cumulative effect on the Campbell brothers. Staula told Agent Toomey that he only saw two people in the bank and never saw a third robber (R. 110-111). Not only does it not take a defense lawyer, it hardly needs anyone trained in the law at all to see that such a statement would constitute classical impeachment material. This is diametrically opposed to his identification of three men at the trial. A person on trial for his life or liberty should not lose the benefit of classical impeachment material based on the test of subjective bad faith on the part of an F.B.I. Agent, especially where this Court has enumerated both in *Jencks* and *Campbell* that fundamental fairness requires that the interest of the government in a prosecution is not to win a case but to see that justice "shall be done". Notice by direct contrast that if Staula had made a positive identification, he would have been asked to sign the interview notes,[6] and presumably, the notes would have been kept for use at a trial. In other words, if the notes help the government, they are signed and preserved; if they do not help the government, they may, in the discretion of the Agent, be destroyed. Whereas this may not be subjective bad faith, it certainly may be objective bad faith.

The court below holds in effect that there is no duty on the F.B.I. to preserve notes, that there is no right as such in a defendant to get any statement, and that subsection (d) does not apply in the absence of bad faith. This ignores commands, *Palermo* v. *United States*, 360 U.S. 343 at 362-363, involving Sixth Amendment rights in the discovery of

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[6] Although included in the designation, this testimony was unfortunately omitted in the printing of the official record. However, Agent Toomey did testify about having a witness sign the notes if there were a positive identification and this appears in the original record filed in this Court in response to the writ of certiorari in Volume I, page 41.

these statements and that a defendant is *entitled* to relevant and competent statements for impeachment purposes because the *command* of the Jencks Act is to "further the fair and just administration of criminal justice", *Campbell* v. *United States*, 365 U.S. 85, 92. It would not be much of a right, even with its constitutional overtones, if it can be defeated by merely destroying the notes—even though in subjective good faith.

The court below said that " . . . either there is a duty (on the government) or there is not" (R. 92). Likewise, a defendant on trial either has a right or he does not. If there is a duty, then the breach of it must carry either an alternative remedy or else carry sanctions. There is always the possibility of an innocent person being convicted on the testimony of a mistaken or overzealous witness, and "although the F.B.I. has an interest in maintaining secrecy on a broad base" (R. 91), it should not be such as to destroy the rights of a defendant in a criminal trial. This would be violative of the spirit and requirements of due process.

Petitioners submit that the holdings of the court below are too harsh and bring about a result which was not intended by the Congress in enacting the statute. The complete lack of remedy if subjective good faith is shown violates the spirit of the constitutional and common-law standards.

There may still exist another possible alternative to imposing the sanctions of subsection (d) under the doctrine of secondary evidence[7] which will be discussed under No. 5, *infra*.

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[7] It should be noted that the members of this Court who joined in the concurring opinion of *Palermo* v. *United States*, 360 U.S. at 363, did not feel that this statute provided an exclusive vehicle for discovery in all events.

The question of remedy here is of the utmost importance since the defendants did not receive this information at all during the trial. The court below held the question of producibility of the notes under (e)(1) was academic because there was a lack of showing bad faith (R. 148-149). If that be so and no "copy" were given to the defendant, then there is no duty, no right, and no remedy. It is highly doubtful that this result was intended either by the Congress in enacting this Act or by this Court in interpreting it. It is obviously a highly undesirable result since it can have the effect of being an instrument to end discovery rather than to limit it.

2.

The Interview Report Is a "Substantially Verbatim" and "Contemporaneously Recorded" Statement.

As argued above, both of the statutory phrases used in the title of this section just above have statutory definitions peculiar to this Act, separate and apart from any dictionary meanings these same words might have. In *Palermo* v. *United States*, 360 U.S. 343, this Court there held that the particular interview report in question was not a substantially verbatim statement. Although the result was reached unanimously, a concurring opinion was filed which recognized certain danger signals if the result were misinterpreted by the lower courts. Sure enough, the court below dismissed the Jencks aspect of the first Campbell appeal without any discussion by merely citing *Palermo*. Thereafter, on certiorari, this Court *unanimously* remanded this case on the issue of whether this Interview Report was a substantially verbatim "statement". Despite the very obvious fact that the Report, which was before this Court, contained third person phrases and could not have been

exactly verbatim, the court below persisted in imposing all but impossible to attain standards and a very literalistic definition of "substantially verbatim". The court below referred to the test of "substantially accurate" as being too loose a construction (R. 93). It is difficult to see how the court below retained its viewpoint of form over substance after the earlier action by this Court in this case.

"Substantially verbatim" clearly does not mean exactly word for word as the Government attempted to bring out in its questioning of Toomey and as was intimated by the court below. The standards advanced by the court below are so rigid that nothing short of a statement taken by a police stenographer, court reporter, or a recording device would ever be producible under (e)(2), and that type of statement would be a rarity when an Agent is away from his office interviewing witnesses at the scene of a crime or at their homes or businesses. As noted by Judge Wyzanski (R. 132), the notes in this case resembled the type of notes which until two decades ago were used as the source of records in criminal appeals in federal courts. In this respect, this Court said in *Palermo*, 360 U.S. at 352:

> "We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements."

This Court also said in *Palermo*, 360 U.S. at 353, that "we do not wish to create the impression of a 'delusive exactness' ". Judge McCarthy, in his opinion (R. 75-79) quotes from *Palermo*, 360 U.S. at 352-353[8] wherein it speaks of "summaries of an oral statement which evidence substantial selection of material or which were prepared after the interview without the aid of complete notes . . . " In

[8] The Government used the same quote on p. 11 of its Brief in Opposition to the Petition for Writ of Certiorari.

the case at bar, these objections do not obtain at all. Mr. Toomey testified that he "had complete notes with respect to the pertinent information on this witness" (R. 33) when he dictated his Report. There cannot be found anything anywhere in the entire record of this case to show that any impressions of the Agent are contained in the Report, that the Agent did any editorializing, that there was any "substantial selection of material", or that there was a lack of "complete notes". As noted above in the Statement section of this Brief, the Report is an accurate transcript of the interview notes and has the same meaning as the interview notes. Actually, there is no reason not to allow discovery at this point. The witness' identity is no longer secret nor is his testimony. There is very apt language in the concurring opinion of *Palermo*, 360 U.S. at 365-366, pertaining to this:

> "... Congress made crystal clear its purpose only to check extravagant interpretations of Jencks in the lower courts while reaffirming the basic holding that a defendant on trial should be ENTITLED to statements helpful in the cross-examination of government witnesses who testify against him. Although it is plain that some restrictions on production have been introduced, it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it *exalting and exaggerating its restrictions,* in disregard of the congressional aim of reaffirming the basic Jencks principle of *assuring* the defendant *a fair opportunity* to make his defense. Examination of the papers so seduously kept from defendant in this case and companion cases does not indicate any governmental interest, *outside of the prosecution's interest in conviction,* that is served by

nondisclosure, and one may wonder whether this is not usually so. There inheres in an OVERRIGID interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production." (Emphasis added.)

There is still another aspect to this issue involving the phrase "substantially verbatim". In this case, the Interview Report contains one quotation and the descriptions contained therein are the witness' own words. The following quotes from the concurring opinion in *Palermo* are appropriate to this issue. This Court said at 360 U.S. at 364-365:

"If such a transcript would be producible, how distinguish a *substantially faithful* reproduction, made by the interviewer from his notes or from memory, of any part of the interview? Since, as the Court's opinion concedes, statements made up from the interviewer's notes *are not per se unproducible*, one would suppose that a summary, part of which gave a substantially verbatim account of part of the interview, would, as to that part, be producible under the statute." (Emphasis added.)

Further, the concurring Justices said, 360 U.S. at 365:

"Certainly, a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation. . . . Here too, the constitutional question close to the surface of our holding in Jencks must be borne in mind."

It should be borne in mind that Mr. Toomey is a trained, highly skilled Agent of the F.B.I. with 18 years of experience who received specialized training in taking notes and making reports.

The court below further held that the Report could not qualify under (e)(2) because it "was not contemporaneous with Staula's oral statement to Toomey" (R. 137). Despite this holding by the court below, the actual test to be applied is whether there was a contemporaneous recording from which the transcription was later made. This test was stated in exact terms by Mr. Justice Frankfurter in *Palermo*, 360 U.S. at 351-352, and again in *Campbell*, 365 U.S. at 107, n. 3. The ruling of the court below in this respect is clearly erroneous.

3.

Approval of the Agent's Notes Under Subsection (e)(1).

There can be no dispute about the fact that Agent Toomey made notes during his interview with Staula. Staula himself testified that after the notes were taken, the notes were read back to him and he signified approval by saying what was read back to him was true (R. 106-107). Agent Toomey demonstrated how he went over his notes and the judge described it as reading from his notes before speaking, and then repeating the sequence (R. 115), and he incorporated the exact words of the notes into his narrative (R. 119). (See also R. 7.) On this record, no other conclusion can fairly be reached than that Agent Toomey received approval of his notes from Staula.[9]

In the discussion of subsection (e)(1) in its opinions of November 7, 1961 (R. 86-97), and May 22, 1962 (R. 135-141),

[9] No claim is made that Staula ever read the notes himself or that he signed them.

it is difficult to make out what standards the court below applies to this section. It almost appears as if the test of "substantially verbatim" were being applied to (e)(1).

It must be borne in mind that under (e)(1), it is the Agent's notes that are to be approved and has nothing to do with the size or content of the witness' story or the use of language by the witness himself. The notes could be anything at all so long as they were read back to and approved by the witness, in writing or otherwise.[10] As one Justice of this Court observed during oral arguments on the previous *Campbell* case, it would not matter if the notes were written in hieroglyphics so long as they were read back and approved. The notes need not be in the witness' own words at all. See 75 Harv. L. Rev. 179, 181-182 (1961). Petitioners believe that the Solicitor General's Brief in the previous case conceded (at p. 22 n. 9) that the Agent's longhand notes would be producible under the circumstances now shown to exist. Staula's signature was not essential if the notes were otherwise adopted or approved (365 U.S. at 93-94).

The court below said that "a writing not specifically approved is not producible in spite of its general accuracy if it is not substantially verbatim" (R. 90). This appears to be confusing, but in any event, it can hardly be said that Toomey did not go over exactly what he had in his notes and receive specific approval of his notes. The notes, under (e)(1), do not need to be generally accurate (provided, of course, they are approved) or substantially verbatim. If the witness approved the entire narrative and all the notes are included therein, then the notes are approved. There

[10] The court below and the Government in its Brief in Opposition state that any approval not in writing must be something "comparable to a signature" (R. 94). In its context, this defies definition. No definition in this regard was attempted either by the government in its brief or by the court below in its opinion.

is no evidence in this case of the Agent adding anything of substance to his narrative when he went over his notes that was not in his notes.

As an additional matter of F.B.I. routine, Chief Agent Laughlin testified that an Agent is taught to go over his notes with a witness to check the accuracy of his notes. In the final analysis, the court below declined to rule on the producibility of the Agent's notes under (e)(1) because this was in its view an academic question because the notes were destroyed and not in bad faith.

There can be no doubt on this record but that if these notes were still in existence, they would be producible under (e)(1).[11]

4.

The Interview Report Is a "Copy" of the Agent's Notes.

Nothing will ever be clearer from the state of this record than that the Interview Report is a "copy" of the Agent's notes as that word "copy" was used by this Court in *Campbell*. The facts pertaining hereto are fully set out in the Statement section, *supra*, and need not be repeated here in detail. The Report is neither a photocopy nor a carbon copy, but it contains all the information and has the same meaning as the notes. It is therefore a "copy". The court below held that for the Report to be a "copy", it must be identical in every respect "barring perhaps minor misspellings, typographical errors and the like" (R. 140). This view is not only too restrictive and too literal, it is unrealistic, especially in view of the commands and purposes of the Jencks Act. Such a ruling does not meet the

[11] Judge Wyzanski held the Interview Report was producible under (e)(1) and (e)(2). Judge McCarthy held the notes, if still in existence, would not be producible under (e)(1). (R. 77).

ends of justice and violates any constitutional rights that attach to a defendant by reason of this Act and under principles of due process.

5.

The Interview Report as Secondary Evidence of the Agent's Notes.

This issue is a very comprehensive one as petitioners here seek an answer as to whether or not a defendant has any right to discovery under the statute and whether there is any duty imposed by the statute on the government. Also, this provides a possible alternative remedy for the destruction of the original notes rather than imposing the sanctions of subsection (d).

If the original notes otherwise qualify and have been destroyed, there is no reason in fairness or in justice why the best or secondary evidence rule should not be applied. This may perhaps be the compromise solution to the "good faith" and "bad faith" alternatives to subsection (d) as discussed *supra*. Certainly, the Interview Report is the best evidence of what was contained in the interview notes. On the evidence contained in this record, there is utterly no danger of distortion or misquotation.

The substitution of a report based on interview notes destroyed in good faith for the notes themselves was approved as proper practice in *United States* v. *Thomas*, 282 F.2d 191, 194-195, C.A. 2 (1960). This result seems a fair one since the destruction of the notes has prevented the court from conducting the *voir dire* generally necessary to determine whether the notes are "substantially verbatim" or whether the Report is a "copy" of the notes. In such a case, the Government, should be estopped from withholding a report which was actually made from the destroyed notes.

In *United States* v. *Greco*, 298 F.2d 247, 250, C.A. 2 (1962), the court there held that there was no "*legislative requirement that all notes be preserved after transcriptions have been made and checked for accuracy*". (Emphasis added.) Here, the defense was given the accurate transcriptions and therefore the destruction of the notes was held to be immaterial. Nowhere do we find a case with as harsh a result as was found by the court below in these Campbell proceedings where the defense was given nothing and no remedy whatever was awarded. The inference to be derived from *Greco* is that there might be a duty to preserve notes if transcriptions which are checked for accuracy are not made. Conversely, if they are made and the notes are destroyed, the transcriptions are then producible. See *United States* v. *McKeever*, 271 F.2d 669, 674-675, C.A. 2 (1959) and *United States* v. *Waldman*, 159 F. Supp. 747, 749, D.C.N.J. (1958).

If the original notes are producible under either (e)(1) or (e)(2) and are now destroyed and the Interview Report is not a "copy" of the notes, the petitioners "have been denied a statement to which they were entitled under the statute", *Campbell* v. *United States*, 365 U.S. 85, 98. Thus, this Court said that even if the Interview Report itself should be producible (such as a situation where the witness saw it and signed or approved it), the sanctions of subsection (d) might have to be employed. However, if the Report is a "copy" of the notes, then subsection (d) would not have to be employed. This is fair and reasonable and satisfies the requirements of due process.

The petitioners therefore submit that the original notes are producible under either (e)(1) or (e)(2) or both and that the Report is likewise producible. Further, the petitioners submit that the Report is in fact a "copy" of the original notes. If the Government persists in claiming the

Report is not a "copy" of the notes, then the testimony of the witness Staula should have been stricken under the provisions of subsection (d) when the motion was made at the original trial by the defendants and renewed by the defendants at the remand hearing before Judge McCarthy.

In summary, it appears that a defendant does have rights under the statute and the ruling by the court below to the contrary is erroneous. Any other conclusion would defeat the stated purpose of the statute and would probably be unconstitutional. The rationale of *Campbell,* 365 U.S. 85, seems to be that within the framework of the statute, discovery is to be had fairly liberally based on the holding of this Court in the *Jencks* case in order to see that justice is done.

Conclusion

It is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts

LAWRENCE F. O'DONNELL
One State Street
Boston, Massachusetts

Counsel for Petitioners

February, 1963

APPENDIX

TITLE 18 U.S. CODE, SECTION 3500

"DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from

the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 631

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND DONALD LESTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 75–79, 130–134)[1] are reported at 199 F. Supp. 905 and 206 F. Supp. 213. The opinions of the court of appeals (R. 86–97, 135–141, 148–149) are reported at 296 F. 2d 527 and 303 F. 2d 747. The prior opinion of this Court is reported at 365 U.S. 85.

[1] "R." refers to the record on the present petition. "Orig. R." refers to the record filed with the Court on the earlier petition for certiorari, No. 766, Oct. Term 1959.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1962 (R. 142). A petition for rehearing (R. 143–147) was denied on June 26, 1962 (R. 150). The petition for a writ of certiorari was filed on July 21, 1962, and was granted on December 3, 1962 (371 U.S. 919; R. 151). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an F.B.I. investigator's notes of an interview with a witness and the report based on that interview constituted statements of a witness which were producible under 18 U.S.C. 3500(e).

2. Whether, if the material was not producible under the statute, production was nonetheless required by the due process clause of the Fifth Amendment.

3. Whether, if the *notes* were of a kind which would make them subject to an order of production, the trial court was required either to direct production of the *report* or to strike the witness' testimony because the notes were no longer in existence.

STATUTE INVOLVED

Section 3500 of Title 18 U.S.C. provides in pertinent part:

> *§ 3500. Demands for production of statements and reports of witnesses*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective

Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,

which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

THE ORIGINAL TRIAL AND THE REMAND BY THIS COURT

1. *The original trial.*—Petitioners were convicted of bank robbery in the United States District Court for the District of Massachusetts and were sentenced to imprisonment for twenty-five years.

At the trial, Dominic Staula, who was in the bank to make a deposit at the time of the robbery, was a witness for the government. Staula identified petitioner Lester as the robber who had first pointed a gun at him and ordered him to "get over against the wall." Staula also said that petitioner Arnold Campbell resembled one of the other robbers (Orig. R. 139, 145–146). On cross-examination, Staula testified that he had previously identified Lester (on the day after the robbery) from a picture shown him at a gas station (Orig. R. 168, 181, 183, 190) and had made a positive identification before the grand jury (Orig. R. 178). He could give no description of the third man involved in the robbery (Orig. R. 198).

Also on cross-examination, Staula was asked about an interview with F.B.I. agents. In response to a question as to whether he had signed any statements, he said that "The only thing I signed was a piece of paper saying I was in the bank. I didn't sign anything, I just——" (Orig. R. 180). The pertinent cross-examination regarding the circumstances of the

F.B.I. interview was as follows (Orig. R. 199–200; 365 U.S. at 89, note 2):

> XQ. * * * did they write down what you had to say to them?
>
> The COURT. If you know.
>
> The WITNESS. Yes.
>
> XQ. And did they read it back to you, sir?
>
> A. Yes.
>
> XQ. And did they ask you if that was essentially what you had just related to them?
>
> A. Yes.
>
> XQ. And did you tell them yes?
>
> A. Yes.
>
> * * * * *
>
> The COURT: I will order it produced.

Thereafter, at a bench conference the witness said that he was "pretty sure" it was read back to him, and he stated that he thought he had to sign it, but was not sure. The government said that it had no such statement and that the only document in its possession was an interview report prepared subsequently by F.B.I. agent Toomey which, the government claimed, was a summary of the interview. The government stated it had no notes of the interview. The court requested the report, and the government turned it over without objection. The trial court, over objection, allowed Staula to read the interview report. The court refused to order it produced under 18 U.S.C. 3500, *supra*, pp. 2–3, when the witness stated that he had never seen the report, that it was not a substantially verbatim recital, and that "[t]here are things in there

turned around." 365 U.S. at 97. The court, after examining the report *in camera,* excluded it and sealed it for the record.

2. *The original appeal.*—The court of appeals held that the F.B.I. investigator's summary of an account of the bank robbery by a government witness was not a "statement" under 18 U.S.C. 3500, 269 F. 2d 688, 690. This Court granted certiorari limited to the question "[w]hether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. Agent and not the statement signed by the witness without any showing as to what became of the original statement." 362 U.S. 909. In its opinion, this Court stated that the trial judge should not have shown the report to the witness in order to determine its admissibility and that the agent should have been called without waiting for the defense to call him. 365 U.S. 85, 96–98. The Court found, however, that it was impossible to resolve the issue whether the trial court had erred in refusing to produce the investigator's summary because the full facts had not been developed at the trial. *Id.* at 88, 98. It held that extrinsic evidence "was required" to answer the following questions (*id.* at 93–94):

> Did Toomey write down what Staula told him at the interview? If so, did Toomey give Staula the paper "to read over, to make sure that it was right," and did Staula sign it?
>
> Was the Interview Report the paper Staula described, or a copy of that paper? * * *

> If the Interview Report was not the original or a copy of the paper Staula described, what became of the paper?
>
> In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? * * * Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously? * * *

This Court stated that the inquiry was to be conducted, not as an adversary proceeding, but as an aid to the judge in discharging his responsibility to enforce 18 U.S.C. 3500. It remanded the cause to the district court to supplement the record by additional findings. 365 U.S. at 99.

THE FIRST HEARING AND APPEAL FOLLOWING THIS COURT'S REMAND

1. *The district court proceedings.*—At the hearing on the remand (before Judge McCarthy), agent John F. Toomey, Jr., who had been with the F.B.I. for eighteen years (R. 1), testified that he had had a single interview with Staula at the Canton police station before noon on July 19, 1957, the day after the bank robbery (R. 2, 18, 30). The interview lasted approximately thirty minutes (R. 11, 27), and only Toomey and Staula were present (R. 2, 27, 30).

Agent Toomey testified that he took notes of what Staula told him on a lined pad, without a carbon (R. 7, 9, 11). Toomey asked several questions and took notes of Staula's replies (R. 7, 28). The agent did not give his notes to Staula to read, sign, or

initial (R. 4, 9, 12, 20, 29–30). He did not read his notes to Staula (R. 4, 20); instead, he orally repeated to Staula his version of Staula's story, refreshing his memory on the basis of the notes (R. 7, 8). Staula told the agent that his (the agent's) account was correct (R. 19).

Toomey testified further that he took "investigative notes" which were complete with respect to the pertinent information (R. 10, 32). Since Toomey does not take shorthand (R. 28), the notes were in longhand and consisted of "key phrases," abbreviations, and one quotation (R. 16, 28, 32). In addition to the one statement in quotation marks, certain words of description, such as "Male, height 5 feet 10," were those of the witness (R. 22). Since the agent did not write down everything Staula told him, some remarks Staula made were not reflected in the notes or the report (R. 5, 15, 29, 31, 36).

The agent dictated the report into a dictaphone, at about nine o'clock in the evening, at his office (R. 8, 25, 30, 40, 44). Staula was not present (R. 7). The agent had talked to another witness that day and had discussed the case with another agent who had interviewed witnesses (R. 6, 9, 10, 13). The report was not a transcript or verbatim copy of the notes (R. 17, 24–26, 33, 39). There was nothing in the notes that was not in the report, but there were some matters in the interview report which were not in the notes (R. 25), such as the name of the teller, the bank, and the town where the robbery occurred (R. 25, 26, 34–35). Before dictating the report, the agent set "the thing up in more or less chronological order" (R. 33).

Then, using the notes to refresh his memory, he paraphrased some of Staula's remarks and put them into proper grammar (R. 33, 40, 46). Agent Toomey identified several phrases in the report (*e.g.*, "a customer at the victim bank") as being his, rather than the witness' words (R. 34). On five or six occasions the report attributed statements to the witness, prefacing them by words such as "Mr. Staula stated * * *"; agent Toomey testified that such statements accurately reflected what Staula had said (R. 24). The report, he testified further, reflected the information in the notes (R. 26–27).

The report was typed by a stenographer in the Boston F.B.I. office and returned to Toomey five or six days later (R. 17, 23). After he had compared the report with his notes to see that the report was accurate, Toomey destroyed his handwritten notes (R. 16–17, 23, 42). This was the general practice of the F.B.I. at that time (R. 23, 42, 60–62).

The trial judge was of the opinion that he could not call Staula as a witness, but he did consider the testimony of Staula given at the original trial (R. 77–78). He found that the original notes, if they had been in existence at the time of the trial, would not have been producible under the statute and that their destruction did not constitute non-compliance within the meaning of 18 U.S.C. 3500(d). He also held that the interview report was not a producible document under Section 3500(e) (R. 78–79).

2. *The opinion of the court of appeals.*—The court of appeals held that a writing based upon an interview,

in order to be producible, must either be specifically approved by the person interviewed or must be substantially verbatim (R. 90). The court said that the test for producibility of unapproved statements—that they be "substantially verbatim" (18 U.S.C. 3500(e)(2))—calls for a "very high degree of exactness" (R. 93). The court, on the basis of the evidence at the hearing before the district court, said that it was clear that what Staula told agent Toomey differed from both the notes and the eventual report (R. 89). Therefore, it ruled that neither the notes nor the report had the requisite exactness to be produced as a "substantially verbatim recital of an oral statement made by [a] witness" which was required to be produced under subsection (e)(2) (R. 96).

The court of appeals held that subsection (e)(1) requires that the action of the witness in adopting or approving the written statement must be "comparable to a signature" and "not merely approval of a general account of which the writing may be representative" (R. 94). The court found that the general oral approval by Staula of what Toomey had recited did not constitute such specific approval. Since, however, it was not clear from the record because of the district judge's erroneous impression that he could not call Staula as a witness, whether Staula had actually signed or approved the notes, the court ordered a further hearing, so that both Staula and Toomey might be examined on the specific question of whether Staula had signed or otherwise adopted or approved the notes (R. 97).

THE SECOND HEARING AND APPEAL FOLLOWING THIS COURT'S REMAND

1. *The district court proceedings.—a.* On November 29, 1961, a second hearing was held before a different district judge (Judge Wyzanski), at which Staula and Toomey testified (R. 100–129).

Staula testified that he had talked with more than one person about the robbery; he did not know whether they were all agents, but did remember an interview at police headquarters on the day after the robbery (R. 101). Defense counsel asked Staula if his trial testimony was still true, and Staula replied that it was (R. 103–104). When defense counsel, reading from Staula's testimony at the original trial, suggested that the agents wrote down what was said, Staula answered (R. 104–105):

> A. Well, they took notes.
>
> Q. Did they write down something while you were talking to them?
>
> A. Well, I really don't know what they were writing down.
>
> Q. The question is whether or not they were writing something.
>
> A. Well, he had a pad in his hand. I don't notice whether he kept writing while I was talking or not.
>
> * * * * *
>
> Q. Well, when you said earlier—"did they write down what you had to say to them"?—and you said "Yes," is that a correct answer?
>
> A. I took it for granted he was writing down what I said.

Staula said that the agent had never given him the pad to read, so that he had no knowledge of what was

written down (R. 108). Thereafter Staula was asked (R. 108):

> Q. So that when you told counsel that he read back what was on the paper, you didn't know what was on the paper at that time, did you?
>
> A. No.

Agent Toomey reaffirmed his former testimony (R. 112–113). In explaining what he did after he had taken the notes, he said that he orally stated the story to Staula "in narrative form," referring to his notes, and that Staula agreed the story was correct (R. 113). To demonstrate to the court what was meant by "narrative form," Toomey, using the interview report, recited parts of the story (R. 113–115). For example, he said (R. 115):

> You stood with your face to the wall for probably ten minutes and then you were told to walk into the vault. You don't recall which one of the men ordered you to go into the vault. And after you got in there you saw these individuals. You didn't see these individuals again. And then somebody closed the door of the vault and said something to the effect that the people in there should not leave for five or ten minutes.[2]

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[2] The interview report for this portion read (365 U.S. at 91, note 3):

"He stated that after he stood with his face to the wall for approximately 10 minutes one of the robbers ordered him and the other people who were standing on either side of him to walk into the vault. He stated that he does not recall which of the robbers issued this order but that he did enter the vault as directed and observed these individuals no further.

"Mr. Staula stated that one of the robbers, closed the door of the vault he issued some order to the effect that the people locked inside should not leave and that they stayed there for 5 or 10 minutes * * *."

The trial court observed that Toomey looked down at the paper before each sentence and Toomey agreed that this was a correct description (R. 115). Toomey stated that his notes covered approximately a page and a half (R. 117). There was only one phrase with quotation marks, and the only other words which were actually those furnished by the witness were his name and address, and the physical description of a robber (R. 118–119). Toomey stated that if another person with the same knowledge of the case had been in the room when Staula spoke, and knew the significance of the notations made by Toomey, he could have dictated substantially the same story (R. 120–122). Toomey confirmed that he had not shown Staula the notes, nor asked him to initial or sign anything (R. 122), and that he had not read his notes back to Staula (R. 123). He did not subsequently transcribe the notes, but used them as a basis for dictating his report (R. 123–124). Toomey testified that his oral summary of Staula's remarks, made in the latter's presence, differed from the notes and also differed from the final interview report (R. 126–127).

b. On December 5, 1961, Judge Wyzanski entered his findings (R. 130–134). He found that Toomey had not read the jottings to Staula, but had adhered to the substance by looking down at the jottings before uttering each sentence, and that Staula had said that the account was true (R. 131–132). He said that Toomey had not asked Staula to sign his approval (R. 132). He further found that

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there was no difference of substance between what Toomey repeated to Staula and what had been jotted on the pad (R. 132). He determined that the disc made by Toomey was a faithful record of Staula's words, some recorded in jottings and and some carried in Toomey's memory (R. 132). The trial judge was of the opinion that Toomey's oral presentation had been adopted by Staula, that the oral presentation was an accurate summary, and that what was dictated into the disc was almost *in ipsissima verba* the narrative as checked with Staula (R. 133). The court concluded that the interview report was therefore producible under both subsections of Section 3500(e) (R. 133–134).

2. *The opinion of the court of appeals.*—On May 22, 1962, the court of appeals rendered a supplemental opinion (R. 135–142). Accepting *arguendo* the district court's findings of fact (R. 139), it concluded that the interview report was not producible.

The court (per Chief Judge Woodbury) reiterated its view that the report was not within subsection (e)(2) both because being in Toomey's words, not Staula's, it was not substantially verbatim, and because it was not contemporaneous (R. 137). The court of appeals also concluded that it was not producible under subsection (e)(1) since it was not a written statement "signed or otherwise adopted or approved" by the witness. Staula, the court observed, had not signed Toomey's notes (R. 139). Toomey had merely recited the "substance" of the notes to

Staula, who had said that Toomey "had the story straight." Toomey, moreover, did not dictate his notes; he first rearranged them in chronological order, and then, relying on the notes and his own memory and using his own language, he formulated his report (R. 138). The court pointed out that slight changes in phraseology can often work vast changes in meaning and that to determine which language in the report was actually approved by Staula would pose a subtle and exceedingly difficult, if not impossible, task (R. 139). The court of appeals answered this Court's inquiries (see *supra*, pp. 6–7) by stating: (1) Toomey did not write down what Staula told him, nor did he give the paper to Staula to read or sign; (2) the interview report was not the paper described by Staula or a copy of it; (3) the paper (the notes) was destroyed in accordance with F.B.I. practice; and (4) Staula did not read over, approve, or see the interview report (R. 140).

Judge Aldrich, concurring, further found that many of the district court's findings on the second hearing, such as the finding that the report was the same as the notes, were not supported by the record (R. 140–141).

On petition for rehearing, the court of appeals held that the issue whether the notes (as distinguished from the report) were producible under 18 U.S.C. 3500(e)(1) was "academic" (R. 148–149). The court reasoned that the statute did not require the F.B.I.

"to take the statements of witnesses" and imposed "no duty, at least in the absence of bad faith, to keep any statements that might have been taken" (R. 148). There was, the court added, "no evidence from which it could possibly be found that Toomey destroyed his notes in bad faith * * *" (R. 148).

SUMMARY OF ARGUMENT

I

During the interview between Staula, the government witness, and the F.B.I. agent, the agent took notes, consisting of abbreviations and key phrases, of Staula's statements. The agent then recited back to Staula the events which Staula had described. Staula agreed with the accuracy of this recital. Nine hours later, the agent made a report on the basis of his notes, his memory, and information from other sources.

A. Under these circumstances, the notes and report were not "statements" of a government witness within the meaning of 18 U.S.C. 3500(e). Therefore, they were not producible under 18 U.S.C. 3500(b) for purposes of impeachment.

1. Subsection (e)(1) of 18 U.S.C. 3500 requires the production of a statement which is signed or otherwise adopted by the witness. This clearly means a written document which the witness has seen and indicated in some way that he has accepted. The document must be fairly attributable to the witness.

It is undisputed that Staula did not see, read, or sign either the notes or the report. His approval of an oral recitation given by the agent was obviously not approval of a written statement. Nor were the

notes read to Staula. Accordingly, his approval of the agent's oral recital could not constitute approval of the notes.

The report made by the agent was even more clearly not adopted by the witness. It was not even in existence when the agent saw Staula and could not possibly have been approved. Even if, as seems extremely doubtful, the report was exactly the same as the agent's oral recital to Staula, subsection (e)(1) does not cover a subsequent written report of an oral account given by an agent to a witness which the witness orally approved.

2. Subsection (e)(2) requires production of a document which (i) is a "stenographic, mechanical, electrical or other recording" of the oral statement of the witness, or a transcription of a recording; (ii) is a "substantially verbatim recital" of the witness' statement; and (iii) has been made "contemporaneously" with the oral statement. The word "recording" refers to an actual record of what the witness has said—not someone's memory of it. Since Congress did not think the word "recording" sufficiently narrow, it required production only of a recording made by an established technique designed to produce the witness' exact words and explicitly required that the statement be substantially verbatim. Congress intended to allow a witness to be impeached only on the basis of his own words, not someone else's.

The notes plainly did not constitute a "recording" and were not "substantially verbatim." They consisted of key phrases and abbreviations, and left out some of Staula's statements entirely. The primary

purpose of the notes was to record briefly information needed for further investigation of an unsolved crime, not to record accurately what the witness had said for purpose of trial.

The agent's report satisfied none of the three requirements of subsection (e)(2). It was obviously neither a recording nor a substantially verbatim recital of Staula's oral account. The agent made no effort to reproduce Staula's oral statement or even the agent's own notes. The information in the notes was combined with other information, was rearranged, and put for the most part in the agent's own words. The report was made nine hours after the interview and was therefore not contemporaneous.

B. The legislative history confirms the conclusion that neither the notes nor the report constitutes a "statement" under the Act. That history shows that Congress deliberately excluded summaries of a witness' oral statements—the very kind of document involved in this case. Throughout the reports and debates there is an emphasis on protecting a witness from being subjected to the harassment of cross-examination based on information not directly attributable to the witness himself. This Court in *Palermo* v. *United States,* 360 U.S. 343, 352–353, specifically held that the legislative history demonstrated that Congress intended in the Act to require the production only of statements in the witness' own words and not summaries.

II

Failure to turn over the notes and report did not result in a conviction without due process of law. The government may be required in certain instances to give information to the defense—for example, if the government knows that a witness has perjured himself. Such a duty exists regardless whether the information is in a report or not; it has therefore nothing to do with Section 3500, and that section is not exclusive in this regard. However, this Court has held that, with regard to the production of statements given by government witnesses for purposes of impeachment, 18 U.S.C. 3500 is exclusive. *Palermo* v. *United States, supra; Rosenberg* v. *United States,* 360 U.S. 367. Therefore, the government is not required to produce any notes or reports not coming within that section.

But even if there may be extreme cases where a report outside Section 3500 must be given to the defense as a matter of due process, this is not such a case. The most arguable example would be if a witness told a story at the trial completely contradictory to that which he had originally told the government. The report here, however, was not inconsistent with Staula's testimony and the difference in nuances was not necessarily attributable to Staula. This was precisely the type of report that Congress declared should not be used for impeachment, and no facts are shown which would justify production outside the scope of the congressional mandate.

III

Even if the notes had been producible, their good-faith destruction, in accordance with normal practice, did not require either striking the witness' testimony or production of the report.

1. Subsection (d) of 18 U.S.C. 3500 plainly does not require striking a witness' testimony when the notes of his interview have been destroyed in ordinary course. Section 3500 first refers to any statement in the possession of the government; it then provides for striking a witness' testimony when the government "elects" not to produce. Thus, it plainly applies only when the government has the document, unless it has been shown that the government has destroyed it for improper motives. Subsequent to the remand in this case, this Court in *Killian* v. *United States*, 368 U.S. 231, ruled that a good-faith destruction of temporary notes did not require a new trial.

2. Nor would good-faith destruction of the notes entitle petitioners to the report as secondary evidence. To allow production of the report as secondary evidence of the notes would defeat the Congress' clear purpose in Section 3500 to make producible only statements which are clearly attributable to the witness. Good-faith destruction cannot create a producible statement out of one which does not qualify under the statute.

ARGUMENT

INTRODUCTION

The hearings on the remand of this case have made clear that the issue which this case was originally thought to present—the effect of the destruction of a statement read and signed by a witness—is not in the case at all. There is no dispute about the fact that Staula neither read nor signed anything. He neither saw nor read the notes; he did not see or read the agent's subsequent report of the interview. What happened is that the agent, in interviewing Staula, took notes summarizing those items that he deemed to be significant. On the basis of this summary, the agent orally stated his version of Staula's account—which Staula affirmed to be correct. Thereafter the agent, using his notes and other information as a basis, dictated an interview report which embodied the features of the interview he deemed significant. Having completed his report, he destroyed his notes.

The questions which this case now presents are, therefore, whether the notes or the interview report, even though not read or signed by the witness, were producible statements under 18 U.S.C. 3500, and whether, even if they did not qualify under the statute, they should nevertheless have been produced. It is the government's position that neither the notes nor the report qualify as producible state-

ments under the statute and that there were no other circumstances which would require their production. If, contrary to our contentions, the notes were properly producible, the issue remains whether the destruction, in accordance with usual practice, required the district court either to order production of the report or to strike Staula's testimony.

I

THE NOTES AND REPORT OF THE AGENT WERE NOT PRODUCIBLE UNDER 18 U.S.C. 3500(e)

A. THE CONDITIONS STATED IN THE STATUTE WERE NOT SATISFIED

Section 3500(b) of Title 18 U.S.C. provides that the government is required to produce certain statements made by government witnesses to government agents for the purpose of enabling the defense to seek to impeach those witnesses. Subsection (e) defines the two types of statements which are producible: "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Neither the notes nor the report qualify under either definition.

1. *Neither the notes nor the report was "signed or otherwise adopted or approved" by the witness within the meaning of subsection (e)(1)*

A writing need not be produced under subsection (e)(1) unless it is a "written statement" made by the witness and "signed or otherwise adopted or approved by him." The obvious intent is that the witness should have seen the document and manifested, either by his signature or by some other method, his acceptance of the document as his own statement. A witness cannot (except for the type of statement defined in subsection (e)(2)) be impeached by a document which he has not adopted as his own. He can, of course, be impeached by other means—by cross-examination or contradictory testimony, or by proof of lack of credibility—but if the impeachment is to be on the basis of a document, the document must, under the statute, be fairly attributable to the witness.

In this case it is undisputed that Staula did not see, read, or sign the notes (R. 108; Pet. Br. 21, note 9). Staula did say that the agent's oral account of the events that Staula had described was an accurate account of what had occurred (R. 131). We doubt whether Staula's acknowledgment of the accuracy of Toomey's recital is fairly to be taken as an adoption or approval of the agent's statement as his own, but the point is immaterial because the agent's oral

account obviously was not the "written statement" that the statute requires.

Nor can it be said that the notes were read to Staula and that he then "adopted or approved" the notes. The testimony is clear that the agent did not read the notes (R. 4, 20, 123); he recounted to Staula a narrative of the events Staula had described, basing the narrative on his notes (R. 7, 8, 113). But the notes were not in narrative form. They were jottings which the agent used to refresh his memory in constructing the narrative (R. 118–119). As every lawyer is aware, no two statements or arguments based upon the same notes will be exactly alike. At the hearing, the agent demonstrated from the report in front of him how the notes were used. He stated that Staula said that "somebody closed the door of the vault and said something to the effect that the people in there should not leave for five or ten minutes" (R. 115). The report recounts that Staula said that the robber who closed the door told them not to leave and that they stayed there for five or ten minutes until the door was opened. See 365 U.S. at 91, note 3. This is a good example of why a witness should not be impeached on the basis of a document which is not, in a very real sense, his own and which he has not specifically adopted. A skillful cross-examiner could make much of the difference, quite unfairly to Staula who had not chosen the words. Judge Wyzanski also found that the agent changed the sequence. These are highly

significant variations. As this Court said in *Jencks* v. *United States*, 353 U.S. 657, 667:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes * * * [of] a contrast in emphasis upon the same facts, even a different order of treatment * * *.

See also *Clancy* v. *United States*, 365 U.S. 312, 316.

Properly understood, Judge Wyzanski's findings do not establish that Staula adopted the notes. True, toward the conclusion of his opinion, he said (R. 134):

> I am persuaded that Toomey, by glancing down at the jottings and other indications, did in fact "read [those] words to him" and was not "elaborating it [the text] in recounting back to the witness."

But other portions of the opinion make it plain that Judge Wyzanski did not mean literally that the agent read the notes verbatim, but that his oral restatement of the substance of Staula's account of the robbery as derivgd from the notes was enough to satisfy the standards laid down by the court of appeals. Earlier the judge found that "Toomey did not purport to read the jottings on the pad in just the order they appeared, nor with the scrupulous care that one stenographer would read back to another" (R. 131). The notes were "re-arranged for order" and there were other differences in form between what the agent said to Staula and what he had jotted on the pad (R. 132). Indeed, if the concluding portion of Judge

Wyzanski's opinion is to be taken as a finding that the agent read his notes to Staula verbatim so that Staula's approval was an approval of the notes, the finding is utterly without support in the evidence (see R. 4, 20, 123, 141).

The agent's report even more clearly fails to satisfy the requirement of a written statement "signed or otherwise adopted or approved" by the witness. The report was made on the basis of the agent's brief notes, memory, and apparently other information nine hours after the interview had been completed. The alleged "written statement," therefore, was not even in existence for the witness to adopt or approve at the time of the interview, and he never saw it after it was prepared. Normal human experience casts the gravest doubt upon Judge Wyzanski's conclusion that the written report was "almost *in ipsissima verba* the narrative" which the agent orally stated to Staula (R. 133), but even if one accepts that finding, Subsection (e)(1) does not cover a subsequent written report, however accurate, of an oral account given by an agent to a witness which the witness had heard and orally approved. Subsection (e)(1) requires not an oral but a written statement, and the writing must be adopted or approved. Since the witness approved no writing, the agent's report, to qualify as a statement, must satisfy subsection (e)(2), which alone deals with reproductions of oral statements.

Accordingly, we turn to the analysis of that subdivision.

2. Neither the notes nor the report was a producible statement under subsection (e)(2) because neither constituted a substantially verbatim recording, or transcription of a recording, of the witness' oral statement, and the report was not made "contemporaneously" with the oral statement

To be a statement under subsection (e)(2) a document must meet three requirements: (i) it must be a "stenographic, mechanical, electrical, or other recording" of the oral statement, or a transcription of the recording; (ii) it must be a "substantially verbatim recital"; and (iii) the recording must have been made "contemporaneously" with the oral statement.

The notes fail to satisfy either of the first two requirements. Where a witness actually subscribes to the accuracy of a written document or otherwise adopts it as his own, it is fair that he be required to explain any inconsistencies, however small, between his testimony and his written statement, but it is unfair to the witness and disruptive of the search for truth to permit him to be challenged, not with his own words, but with the words of someone else who will inevitably have read into the language his own sense of meaning, emphasis, and coloration. No record of an oral statement which depends upon a human agent is absolutely perfect, but the statutory language shows that nothing less than a recording of assured accuracy was considered acceptable for the purpose at hand. Congress strictly limited the use of reports, concerning a witness' oral statements to a "stenographic, mechanical, electrical, or other recording." The word "recording" indicates

that there must be an actual record of what the witness said—not someone's summary—and since Congress did not think the word "recording" sufficiently narrow, it required the recording to be made by one of the established techniques calculated to reproduce the witness' exact words. Furthermore, to eliminate any possibility of misunderstanding, Congress went on to provide that the recording must be "a substantially verbatim recital of an oral statement."

By no stretch of the imagination can Toomey's investigative notes be regarded as a "recording" constituting a "substantially verbatim recital" of what Staula said. The handwritten notes made by the agent as one of the bases of a more formal report for his colleagues, superiors, and files are subject to all the variations attendant upon individual methods of taking personal notes for the sole purpose of refreshing one's own recollection. The testimony shows that the notes consisted of key phrases and abbreviations; only in a few instances did they correspond to the witness' words (R. 22–26). Some of Staula's statements were not reflected in the notes at all (R. 31, 36).

The agent's testimony concerning the character of his notes is entirely plausible. At the time Staula was interviewed he had not identified petitioner Lester and the report indicates that Staula, who was obviously not very articulate, could not give a very full oral description. Staula identified Lester later when he saw a photograph. Thus, at the time the notes were made the agent must have been primarily concerned with solving the crime rather than with taking an

exact statement from the witness in preparation for a possible prosecution. He would naturally have concentrated on the information which seemed most likely to produce further clues, *i.e.* the description of the man in the blue suit whom Staula, at the trial, could identify only as resembling Arnold Campbell. Similarly, one can feel sure that Toomey was concentrating upon obtaining as much immediately useful information as possible, with substantial accuracy for his purposes, rather than with setting forth verbatim the statement of the witness. We agree, of course, that when the government is preparing for trial it is concerned with obtaining a verbatim statement which may be valuable not only for impeachment but in preparing for trial and for refreshing the witness' recollection. When Staula was interviewed, on the day after the robbery, this was not a primary consideration as shown by the very fact that the agent did not make a recording or even ask Staula to sign or otherwise adopt a written statement.

Toomey's report satisfies none of the three requirements of subsection (e)(2). First, it is not a "stenographic, mechanical, electrical, or other recording" of anything Staula said. If Congress had been satisfied with reports written up by a listener with all the fallibility of human recollection, it would not have confined the definition to recordings made by stenographic, mechanical, electrical, or similar means.

Second, the record in this case shows that the agent's report did not even attempt to reproduce "substantially verbatim" either Staula's statements or Toomey's own notes. The report included informa-

tion concerning the crime which was not in the original notes and which apparently came from other persons to whom the agent had talked during the investigation (R. 25–26, 34–38). This information was mixed indiscriminately with the information obtained from Staula. The agent rearranged his notes before he dictated the report (R. 33, 40). The report did not purport to contain everything that Staula had said, nor did it purport to use Staula's words rather than the agent's (R. 31–36). The chronology, grammar, and structure were all largely attributable to the agent. It is certain that the agent's report did not precisely correspond to the earlier oral summary of the notes and that the extent of the differences can never be reconstructed. Cf. *United States* v. *McKeever*, 271 F. 2d 669, 674–675 (C.A. 2).

Third, the report fails to satisfy subsection (e)(2) because even if it was a recording, it was not "recorded *contemporaneously* with the making of such oral statement" (emphasis added). Obviously, Congress was unwilling, in this instance, to trust human memory for even a few hours as a method of preserving a witness' words.

Judge Wyzanski's reasoning is wholly inconsistent with the thrust of subsection (e). He held, in effect, that the statute was applicable because the agent restated from his notes with substantial accuracy an account of the events that Staula orally approved and subsequently the agent wrote up a report which restated the account, again with substantial accuracy; and this the judge considered near enough to the requirements of the statute. For many purposes the

report might be a reliable guide to the events and even to Staula's recollection as he gave it to Toomey, but it falls short of the kind of statement that Congress was willing to have used for purposes of impeachment. No doubt Congress was as aware as this Court that (*Jencks* v. *United States*, 353 U.S. 657, 667):

> The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

And Congress apparently concluded that witnesses should not be taxed with the omission of facts, or a contrast in emphasis, or a different order of treatment, not part of the witness' own statement but resulting from another person's judgment concerning the relevance of the facts, the desirable emphasis, and the logical order of relation. The words of the statute strictly confine the duty to produce to written statements signed or adopted by the witness and contemporaneous verbatim recordings, made by reliable methods, of what the witness himself said. The legislative history, to which we now turn, shows that these strict requirements were written into the statute by deliberate choice.

B. THE LEGISLATIVE HISTORY CONFIRMS THE CONCLUSION THAT NEITHER THE NOTES NOR THE REPORT CONSTITUTE A "STATEMENT" UNDER THE ACT

The legislative history shows that Congress, in defining the documents which were to be producible

under the Act, proposed to exclude the kind of document involved in this case.[3] Throughout the reports and debates on the proposed bills the emphasis was on protecting a witness from being subjected to the harassment of cross-examination based upon statements which may not be fairly attributable to the witness himself.

In the Senate hearings on the Act, the Attorney General made a statement which was adopted by the committee in reporting a bill requiring only the production of statements signed or approved by the witness. S. Rept. No. 569, 85th Cong., 1st Sess., pp. 3–4. His statement stressed the problems which would arise if the government could be ordered to produce reports orally made by a witness (S. Rept. No. 569, 85th Cong., 1st Sess., p. 7):

> The Department takes the position that unless the witness has been in some way informed of the statements attributed to him, and has indicated his approval of their accuracy, that such reports should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of a witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else.

There is no question about the type of case the Attorney General had in mind. He illustrated his point

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[3] The general legislative history is outlined in *Palermo* v. *United States*, 360 U.S. 343, 345–348, 356–360. The Court's conclusions concerning this history are quoted *infra*, pp. 39–40.

by telling the committee of a narcotics case in Georgia where the government was ordered to produce oral statements which had been "paraphrased and summarized" in the agent's report. "The agent had dictated his report after his interviews and, at best, his report was a summary of the interview—obviously hearsay evidence." *Id.* at 6. In later reporting a bill allowing the production of "any transcriptions or recordings of oral statements made by the witness to a Federal law officer * * *," the Senate Committee again relied heavily on the Attorney General's statement. S. Rept. No. 981, 85th Cong., 1st Sess. It also noted with approval a ruling by Judge Moore in *United States* v. *Anderson,* 154 F. Supp. 374 (E.D. Mo.). Judge Moore had held that the government was required to produce "only continuous, narrative statements made by the witness recorded verbatim, or nearly so," and not "notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions, or conclusions of the person or persons making such notes." S. Rept. No. 981, *supra,* p. 8.

The House Report—which related to a bill allowing the production only of written statements signed by the witness or otherwise adopted or approved—likewise evidenced concern that the witness not be subjected to unfair harassment. The report stated (H. Rept. No. 700, 85th Cong., 1st Sess., pp. 5–6):

> Unless a witness has adopted or otherwise approved reports made to the Government, it is not to be turned over to the defense * * *. Such material, insofar as the witness is con-

> cerned, is hearsay evidence and should not be used to attack his credibility when he is being cross-examined * * *.
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> * * * * *
>
> [The bill] provides that after a Government witness has completed his direct examination, the court shall on motion of the defendant order the United States to produce for the inspection * * * such reports or statements of the witness in the possession of the United States *as are signed by the witness, or otherwise adopted or approved by him as correct,* relating to the subject matter as to which he has testified.
>
> The italicized language is a vital part of the bill. Without this provision the general language of the Jencks case could be interpreted as requiring the production of summaries of oral statements made by witnesses to a law-enforcement agent which the witness had never seen or in any way approved. Unless the witness has been in some way informed of the statements attributed to him and has indicated his approval of their accuracy, the summaries should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of the witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else. [Emphasis in original.]

The House committee noted the practice of federal agencies in taking written statements from important witnesses (*id.* at 6):

> This is vital not only to insure the accuracy of the statement at the time it is made but to

tie the witness down so that he will stand by the statement which he has read and signed.

Where it is impossible to obtain the signature of the witness to his statement, or where because the matter is relatively unimportant a signed statement was not originally requested, it is the practice in many cases to obtain the approval or adoption by the witness of the summary which has been made of his interview. Whenever this is done, the fact of such approval or adoption is made a matter of record and it is the type of statement, in addition to signed statements, which would be subject to production under the bill.

Where, however, it has been impossible to obtain any verification from the witness that a summary of an interview is correct, it is quite clear that such an unverified and unauthenticated summary could not be used legitimately for impeachment purposes.

On July 3, 1957, Senator Morse offered an amendment in the Senate which would have covered the type of interview report involved in this case. The amendment would have required the production of (103 Cong. Rec. 10878):

> Any record in the possession of the United States which contains a recitation or the substance of any oral or written statement previously made by a witness touching upon the substance of the testimony of that witness.

Senator Morse argued that, since very few F.B.I. summaries are seen by witnesses, the bill, unless so amended, would not cover the vast majority of situations. 103 Cong. Rec. 10877–10878. The amendment

was never voted upon and was abandoned. See *id.* at 10984, 15129, 15805–15813, 15799.

The version of the bill before the Senate on August 23, 1957, provided for production of signed or otherwise approved statements, "and any transcriptions or records of oral statements made by the witness to an agent of the Government * * *." 103 Cong. Rec. 15787. During the debate, Senator Morse explained that the original draft had provided that "recordings of oral statements" be "verbatim." He said that "verbatim" was dropped because that was an impossible standard since electrical recordings could be changed, "[i]f transcribed by a secretary, they are subject to error," and even expert official reporters make mistakes. 103 Cong. Rec. 15812. However, Senator Morse said, the Acting Attorney General agreed to eliminate "verbatim" only if the legislative history made clear (*ibid.*):

> that the statements be as close to verbatim as possible—in other words, as close to a word-by-word reproduction as possible.

Although Senator Morse thought this was too limited, his views did not ultimately prevail. The phrase "substantially verbatim" was inserted in the statute as it was passed.

The Department of Justice expressed concern that the word "records" would include memoranda and notes. *Id.* at 15791.[4] An amendment was thereafter offered to change "records" to "recordings." *Id.* at 15930. Senator Dirksen explained that this amendment would require production only of "the actual

[4] Senator O'Mahoney, the manager of the bill in the Senate, characterized this concern as "mere speculation." 103 Cong. Rec. 15791.

recordings"; otherwise, using the word "records," "The sky may be the limit." *Id.* at 15931. Senator Hruska said that "records" was too broad as that would reach summary reports "which represent not the words of a witness whom it is sought to impeach, but instead, the words of some third person's understanding of what the witness said. * * * It would seem to me not to be in keeping with the purpose of the proposed legislation to have a witness impeached by material for which he himself was not responsible." *Ibid.* Senator Kuchel stated that "the ends of justice require the Congress, in determining the procedures in such a case, to clothe the witness, as against the defendant, with some protection, so that the witness will not have thrown at him records which are not agreed to be the witness' statements." *Id.* at 15932. Senator Hickenlooper, in describing what was a "record" rather than a "recording," suggested that, if a witness telephoned an agent, and later the agent wrote down from memory his interpretation of what he understood the witness to say, such notation which the witness had never seen or approved, nor had said was correct, would be a "record." Senator O'Mahoney, the manager of the bill, replied it would be inadmissible and hearsay. *Ibid.*

The amendment to change "records" to "recordings" did not pass, 103 Cong. Rec. 15935. However, the bill as it emerged from Conference (H. Rept. No. 1271, 85th Cong., 1st Sess., p. 2) and, as it was finally enacted, used the word "recording" rather than "records." The conference report of the Managers in the House indicates that subsection (e) was inserted to limit the types of statements producible by the

Act. H. Rept. No. 1271, *supra*, p. 3. The report specifically stated that the final bill was in line with the standards laid down by Judge Moore in the *Anderson* case (see *supra*, p. 33). H. Rept. No. 1271, *supra*, p. 3. In the debate on the conference report, Senator Javits asked (103 Cong. Rec. 16488):

> [W]hat has been done with the so-called records provision [subsection (e)(2)] is to tie it down to those cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him; is that correct?

Senator O'Mahoney replied, "Precisely." 103 Cong. Rec. 16488.

The legislative history precludes the loose interpretation of the term "substantially verbatim" suggested by petitioners. The Congressional intent is clear that a witness may be impeached by documents only if they were truly attributable to the witness—that is, signed or approved by him, or recorded with a high degree of accuracy. Congress approved, in passing the bill, Judge Moore's opinion in *United States* v. *Anderson*, which described the type of document which should be produced as "recorded verbatim, or nearly so." Congress specifically refused to require production of summaries of oral statements made by government witnesses.

In *Palermo* v. *United States*, 360 U.S. 343, 350, 352–353, this Court confirmed this view of the Congressional intent, stating:

[S]ome things too clearly evince a legislative enactment to call for a redundancy of utterance. One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations.

* * * * *

It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so . . .," * * * that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a re-

> port which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced.

The notes and report in this case do not meet the standards for production which the legislative history of the Act and the *Palermo* case establish. The notes were plainly summaries consisting merely of jottings and abbreviations. The notes generally did not incorporate the words of the witness, and some of the witness' remarks were not included in the notes at all.

The report is even more clearly a summary—being approximately 500 words, although the interview lasted for a half hour. The report was purposely selective, containing material not provided by Staula, and omitting material which Staula gave. It is, for the greater part, in the words of the agent, and is based on his memory, the abbreviated investigative notes, and other information.

At the time the report was dictated, the agent did not have any reason to consider his report as a document which would have any bearing on the testimony of a witness. The agent had not obtained from this rather inarticulate witness any verbal de-

scription that was detailed enough to indicate that the witness was important. The agent had no way of knowing that the witness could identify visually what he could not describe orally. The report shows on its face that its primary purpose was to record the clues that might be useful in the investigation of the robbery, rather than to pin down the story of the witness. Under the circumstances, it would be manifestly unfair to the witness to allow him to be impeached upon the basis of a report which so largely reflected the agent's judgment of what was significant and the agent's selection of words, chronology, and detail.

II

FAILURE TO TURN OVER THE NOTES AND REPORT DID NOT RESULT IN A CONVICTION WITHOUT DUE PROCESS OF LAW

In *Palermo* v. *United States*, 360 U.S. 343, 349–351, and *Rosenberg* v. *United States*, 360 U.S. 367, 369, this Court held that 18 U.S.C. 3500, rather than any prior decisional law, controls the production of statements given by government witnesses for purposes of impeachment. The only question remaining, therefore, is whether, even if the notes and report fall outside the statutory definition of a producible statement, the information which they contained was of such significance to the defense that, as a matter of due process, the material, or at least the information contained in it, should have been conveyed to the defendants in the interests of justice. The existence of possible constitutional questions in this area is sug-

gested in the concurring opinion in *Palermo* v. *United States*, 360 U.S. 343, 362–363. But see *id.* at 353–354, note 11 (majority opinion).[5]

It is important to distinguish two separate situations. First, the government may be compelled, either as a matter of due process or of the supervisory power of the courts to ensure the fair administration of criminal justice, to furnish the defense certain *information*. For example, if this government has positive information that false testimony is being given, it would have the duty to come forward itself to offer this information. See *Napue* v. *Illinois*, 360 U.S. 264. This duty exists irrespective of whether the information is contained in notes, a report, or merely in the knowledge of government officials; it has nothing whatsoever to do with the responsibility imposed by 18 U.S.C. 3500 to produce particular documents for purpose of impeachment and therefore that section does not forbid disclosure of this information.

The second situation is when summaries or other documents reflecting statements made by government witnesses are sought by the defense for purpose of impeachment. This is the subject covered by 18 U.S.C. 3500. Congress has decided that a sum-

[5] The majority stated: "The statute as interpreted does not reach any constitutional barrier. Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power. * * * It is obviously a reasonable exercise of power over the rules of procedure and evidence for Congress to determine that only statements of the sort described in (e) are sufficiently reliable or important for purposes of impeachment to justify a requirement that the Government turn them over to the defense."

mary of a witness' statement, which has neither been approved by the witness nor is a substantially verbatim recital of this statement, may not be used to impeach his testimony. This judgment was based on Congress' view that such inexact summaries are not sufficiently reliable (see *supra*, pp. 31–38). We submit that this judgment was a reasonable one—that, therefore, limiting the production of statements to those within the terms of 18 U.S.C. 3500 is fully consistent with due process. We believe, as this Court explicitly held in *Palermo* and *Rosenberg*, that 18 U.S.C. 3500 is exclusive as to the production of statements made by witnesses for the purpose of impeachment.

Assuming *arguendo*, however, that there may be some highly unusual cases where basic fairness requires production of a report for purpose of impeachment even though the report does not come within 18 U.S.C. 3500, this is not such a case. Probably the most arguable example is a witness who originally told the government an elaborate story and then at trial told a diametrically opposed story. But even assuming that due process would require production of a summary of the witness' first statement to the government, there is nothing in this case to bring it within any such exceptional category.

The notes are of course not in existence, so it is impossible to state with precision the information they contained. However, agent Toomey testified that all of the information in the notes was substantially included in the report. Consequently, if the information in the report is not of a kind requiring

production of the report as a matter of due process, the same is likewise true of the notes.

There are no inconsistencies between the report and Staula's trial testimony which could possibly require production as a matter of due process. Staula did not, as petitioners state (Pet. Br. 15), identify the three petitioners at the trial. He identified Lester as the man who held a gun and told him to get up against the wall; he said that Arnold Campbell looked like the man in the blue suit whom he glimpsed through the corner of his eye; and he testified that he knew that there was a third man because he could see that one man was talking to another fellow behind the cages who was not the one standing behind him (Orig. R. 140, 143–147). He was specifically asked whether he could describe the third man in any way and his answer was "No" (Orig. R. 198).

The report is completely consistent with Staula's testimony. As to the third man, the report reads: "Mr. Staula stated that he did not observe a third man in the bank." 365 U.S. at 91, note 3. Staula never claimed at the trial that he actually "observed" the third man or could describe him. Since, at the time Toomey interviewed Staula, identification of the robber was the agent's primary objective, lack of observation would obviously be the most pertinent factor to Toomey.

Nor is the report inconsistent with Staula's testimony as to Arnold Campbell. It is obvious from the report that the agent thought that Campbell would be the robber whom Staula would be most likely to identify. At the trial Staula, far from overstating

his recollection of the robbers, merely said that Arnold Campbell looked like the man in the blue suit.

As to Lester (whom Staula identified at the trial), the interview report states merely that Staula, after he was ordered against the wall, "observed a man whom he described as being a negro, wearing gray chino pants, standing in the center of the lobby and holding a gun." 365 U.S. at 90, note 3. At the trial, Staula testified that, at the time of the robbery, he noticed the man's shirt, a white one with short sleeves (Orig. R. 138–141).

The significant pre-trial event, from Lester's standpoint, is that Staula picked out his photograph and identified him as one of the robbers. This took place on the same day as the Toomey interview, *i.e.*, the day after the robbery. But the interview by Toomey had no relationship to this event. Staula had not seen the photograph at the time of the F.B.I. interview and no F.B.I. agent was present when the photographs were subsequently shown to him (Orig. R. 168–171, 179–180, 193). As to this critical event—the identification of Lester's photograph—defense counsel had opportunity to cross-examine and exercised it to the full (Orig. R. 168–172; 181–184, 187, 190, 192).

There was thus no exceptional reason why the report or the information contained in it should have been turned over to the defense. The report, as such, was not fairly attributable to the witness. The information it contained was not in conflict with his testimony. At most the report might have revealed differences in nuances and details—differences which could not necessarily be attributed to the witness.

There are no circumstances, we submit, which could conceivably justify a holding that constitutional necessity requires the rejection of the rule promulgated by Congress in 18 U.S.C. 3500.

III

EVEN IF THE NOTES WERE PROPERLY PRODUCIBLE, THEIR DESTRUCTION, IN ACCORDANCE WITH USUAL PRACTICE, DID NOT REQUIRE EITHER STRIKING THE WITNESS' TESTIMONY OR PRODUCTION OF THE REPORT

We have argued above that the notes (as well as the report) were not properly producible either under 18 U.S.C. 3500 or as a matter of due process. Here, we assume, *arguendo,* that the notes—which were somewhat more directly based on the witness' statements at the interview than the report and were set down contemporaneously with the statements—were producible as a matter of law. Since they were destroyed by the agent, in accordance with usual practice, immediately after he had read the report, they could not have been produced in fact. The question therefore remains whether, if the notes were producible, the inability of the government to produce them required either striking witness Staula's testimony or production of the report, even though it would not otherwise be producible.

1. *Striking Staula's Testimony.*—As the court of appeals found (R. 148), it is clear that the notes were destroyed by the F.B.I. in good faith. It is the report, rather than the agent's own notes, which is customarily passed on to others. For this reason, although such notes are sometimes kept by the agent,

they are more often destroyed after his investigative report has been prepared. It would be most difficult, if not physically impossible, for the government to keep for years all the personal notes of its various agents, as well as all reports.

In particular, there was no reason why the F.B.I. agent should have deemed his own notes worthy of being kept for subsequent trial purposes. The interview with Staula was intended to obtain information useful to continue the investigation, not to record evidence for a trial. Staula's interview with the F.B.I. was at noon, and therefore before Staula identified petitioner Lester's picture to the police (not the F.B.I.) in the afternoon. From the F.B.I. interview, before the pictures were shown to Staula, the information gathered which could prove useful for future investigation was simply Staula's description of the man in the blue suit (the man whom Staula at the trial could identify only to the extent of saying that Arnold Campbell resembled him). This is reflected in the space devoted to this description in the formal report subsequently made by the F.B.I. agent. Staula's role as a potential witness became truly significant and assumed importance only when he identified Lester, an event which occurred after the F.B.I. interview and was made to persons other than the F.B.I.

If a party wilfully destroys evidence relating to a contested issue, he may be subject to a presumption that the evidence would have been unfavorable to his cause. Applying analagous reasoning, if a court found that a producible statement of a witness had

been destroyed for improper motives, it conceivably could regard destruction as the equivalent of non-compliance with an order to produce under 18 U.S.C. 3500(d). It might therefore preclude the government from using the testimony of the witness whose statement had been so destroyed.

However, subsection (d) plainly does not require striking the testimony of a witness when the record of his statements has been destroyed in ordinary course. The statute refers to any statement of the witness in the possession of the United States. 18 U.S.C. 3500(b). This necessarily means in the possession of the United States at the time production is requested. A party cannot be called upon to produce that which he does not have. Similarly, subsection (d) provides for striking a witness' testimony: "If the United States *elects* not to comply with an order of the court under paragraph (b) * * *" (emphasis added). If the government does not have a document, there can be no election to refuse its production.

If, for example, a statement clearly producible under 18 U.S.C. 3500 was accidentally destroyed by fire, that would be no reason for excluding the live testimony of the witness. Our system of trial rests on the assumption that such testimony given under oath and subject to cross-examination, is superior to an unsworn *ex parte* statement. The *ex parte* statement may or may not be useful in cross-examination of the witness for impeachment purposes, but the mere fact that it is not in existence does not mean

that the testimony of the witness should not be received.

Subsequent to the remand in this case, this Court in *Killian* v. *United States*, 368 U.S. 231, considered the contention that destruction of notes required a new trial. This Court noted "that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed." *Id.* at 242. The Court then held that if the only purpose of the notes was to transfer the information onto signed receipts and if they were then "destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. * * * It is entirely clear that petitioner would not be entitled to a new trial because of the nonproduction of the agents' notes if those notes were so destroyed and not in existence at the time of trial." *Id.* at 242. There was no dissent on this issue.

2. *Producing the Report.*—Nor would the good-faith destruction of the notes entitle petitioners to a copy of the report as secondary evidence of the notes. This would defeat the intent of Congress that the only statements which must be produced are those which are clearly attributable to the witness. Petitioners are incorrect in assuming that 18 U.S.C. 3500 creates a right of discovery. That statute defines statements which are producible for impeachment purposes and the procedures for producing them. Good-faith destruction cannot make a producible statement out of

one which does not qualify under the statutory definition.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

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